PREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-622

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ, *Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands, *Respondents,*

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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and

CONTINENTAL AIRLINES, INC., a Nevada Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the People of Saipan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 16, 1974.

THE OPINIONS BELOW

The opinion of the District Court for the District of Hawaii is reported at 356 F.Supp. 645, and also 5 E.R.C. 1159, and is set out in Appendix A. The opinion of the Court of Appeals, not yet officially reported, is reported at 6 E.R.C. 1952, and is set out in Appendix B. The order denying the petition for rehearing also is set out in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 16, 1974. A timely petition for rehearing was denied on September 3, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts have the power to review, under the National Environmental Policy Act, major actions of the Secretary of the Interior, and of Federal appointees under his supervision and direction, significantly affecting the quality of the human environment in the Trust Territory of the Pacific Islands.

2. Whether the doctrine of comity may properly be applied to relegate a case involving a substantial federal question to a court from which there is no possibility of ultimate review by the Supreme Court.

3. Whether a district court may find, on the basis of affidavits and testimony, that allegations in a complaint were unwarranted inferences of fact not to be taken as true on a motion to dismiss, without treating the motion as one for summary judgment and provid-

ing plaintiffs with a reasonable opportunity to present pertinent material.

STATUTORY PROVISIONS INVOLVED

The National Environmental Policy Act, subchapter I, 42 U.S.C. §§ 4321-4335 is set out in Appendix C.

The Trusteeship Agreement (61 Stat. 3301), 48 U.S.C. § 1681(a), Executive Order No. 11021 and Department of the Interior Order No. 2918 are set out in Appendix D.

STATEMENT OF THE CASE

The Trust Territory of the Pacific Islands, also known as Micronesia, consists of over 2,000 islands and islets distributed over some three million square miles of the western Pacific Ocean. The Trust Territory, which includes Saipan, is administered by the United States pursuant to an agreement between the United States and the United Nations, the Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), under which the United States has "full powers of administration, legislation, and jurisdiction." App. D at 56a.

Direct responsibility for administration of the Trust Territory has been delegated to the Secretary of the Interior. 48 U.S.C. § 1681a; Executive Order No. 11021 (3 C.F.R. 1959-63 Comp. at 600). App. D at 61a. As a practical matter, much of the day to day administration is in the hands of the Director of the Office of Territories of the Department of the Interior and of the High Commissioner, appointed by the President with the advice and consent of the Senate. 48 U.S.C. § 1681a. Both of these latter officials exercise

their authority under the supervision and direction of the Secretary of the Interior. Department of Interior Order No. 2918, Part II, § 1. App. D at 56a.

The present dispute arose when the High Commissioner signed a long-term lease granting Continental Airlines, Inc. public land unique to the people of Saipan in its cultural, historical, and recreational significance, for the construction of a large resort hotel. Plaintiffs claimed that the High Commissioner is a federal agent and part of a federal agency and that his execution and implementation of this lease without an adequate and formal decisionmaking process, without consideration of the significant environmental and cultural impact of the hotel, and over the opposition of every official body elected by the people of Saipan, violates the National Environmental Policy Act. Both the District Court for the District of Hawaii and the Court of Appeals for the Ninth Circuit rejected plaintiffs' claim, finding that the governmental approval and execution of the lease were not "federal" action within the meaning of the National Environmental Policy Act. App. A at 22a; App. B at 33a.

Plaintiffs also contended that execution of the lease was an act of a United States government agency for which the Secretary of the Interior was responsible, and that therefore the Secretary was required to assure that such a lease be executed only after compliance with federal laws conditioning the exercise of powers by federal agencies. Thus, plaintiffs contended, the execution of the lease without compliance with NEPA would have been a violation of the Secretary's duties under NEPA even if he had no actual knowledge of the lease. Neither Court addressed this contention.

Plaintiffs further alleged that Secretary Morton, Director Carpenter of the Office of Territories and other Washington, D.C. Interior officials were aware of and directly involved in the decisionmaking process. The District Court found, on the basis of affidavits and testimony, that the allegations concerning involvement of such Department of Interior officials were unwarranted inferences of fact not to be taken as true on a motion to dismiss. In so finding, the District Court did not treat the motion to dismiss as one for summary judgment and accordingly neither provided the plaintiffs with the ten-day notice required by Rule 56(c) of the Federal Rules of Civil Procedure nor with the "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" required by Rule 12(b) of the Federal Rules of Civil Procedure. The Court of Appeals did not discuss this ground of appeal other than to note, in discussing a different issue, that "the Secretary of the Interior assures us that his department did not participate in any way in the decision to grant a lease to Continental. . . ." App. B at 40a.

Another claim made by plaintiffs was based on the obligation of the United States under Article 6(2) of the Trusteeship Agreement to protect Micronesians against the loss of their lands and resources. The District Court held that the Trusteeship Agreement was not self-executing and that plaintiffs had no judicially enforceable rights thereunder. App. A. The Court of Appeals reversed this holding, but held that the doctrine of comity required that such rights be enforced in the High Court of the Trust Territory, a body created by and subordinate to the Secretary of the

Interior [1]. App. B at 39a. The question of comity had not been raised or briefed by any party and was not mentioned in oral argument. Plaintiffs' petition for rehearing on this point was denied by the Court of Appeals.

Jurisdiction in the United States District Court is based on the existence of federal questions under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, and an amount in controversy in excess of $10,000, pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

1. The National Environmental Policy Act Should Apply to Major Actions of the Secretary of the Interior and Federal Appointees Acting under His Supervision and Direction, When Such Actions Significantly Affect the Quality of the Human Environment

Section 4332 of Title 42, United States Code, specifies that *all agencies* of the Federal Government shall comply with the procedural requirements of the National Environmental Policy Act (NEPA).

The Secretary of the Interior asserts almost plenary administrative authority over Micronesia, comprising somewhat more than three million square miles of the earth's surface, an area larger than the forty-eight contiguous States. His actions and those of other fed-

[1] The Court of Appeals opinion permits plaintiffs to refile the action in the District Court for the District of Hawaii only upon an outright refusal by the High Court to find that it has power to review claimed violations of the Trusteeship Agreement. App. B at 41a. But without such a refusal, any decision of the High Court on the Trusteeship Agreement would not be reviewable in any federal court.

eral appointees acting under his supervision and direction thus have the potential of significantly affecting a very large environment indeed. The potential for unanticipated environmental and cultural impact, and the necessity for careful consideration of major actions in advance, is increased by the delicate ecology of the atolls, reefs, and islands of Micronesia, the varieties of cultures there and the general unfamiliarity of American administrators with Micronesian environment and cultures.

That the Congress of the United States was not solely concerned with environmental quality in the United States proper is clear from the language of NEPA. See 42 U.S.C. § 4332 (E), mandating agency recognition of the "worldwide and long-range character of environmental problems."

There is no question that Congress has the power to require the Department of Interior to comply with NEPA in its activities in the Trust Territory. Congress, in enacting NEPA, intended "to exert all the power it possessed in respect of the subject matter. . . ." *United States* v. *Standard Oil Co.*, 404 U.S. 558 (1972).

Nonetheless, the District Court and the Court of Appeals found that the actions of the High Commissioner, and any other Interior officials who may have been involved, were not the actions of a federal agency. App. A at 22a; App. B at 33a. Other Courts of Appeals have exempted the Environmental Protection Agency itself from the "all agencies of the Federal Government" requirement of NEPA. *See, e.g., Environmental Defense Fund* v. *Environmental Protection Agency*, 489 F.2d 1247, 1254-57 (D.C. Cir. 1973); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1305-06 (10th Cir. 1973); *Getty Oil Co.* v. *Ruckelshaus*, 467

F.2d 349, 359 (3d Cir. 1972). But the decision below stands alone in exempting from the requirements of NEPA an agency deriving its authority from the federal government and whose primary mission is not the protection of the environment. Such an agency must comply with NEPA "to the fullest extent unless there is a clear conflict of *statutory* authority." *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). There is no such authority precluding compliance with NEPA by the High Commissioner.

Both courts below read the Administrative Procedure Act's exclusion of the governments of territories and possessions from judicial review under that Act to also preclude judicial review under NEPA. App. A at 22a; App. B at 33a. The gratuitous use of an APA exclusion to preclude review under NEPA, which contains no such exclusion, directly contradicts the purpose of the APA to expand, not to contract, the powers of federal courts to correct agency action which is contrary to federal law.

2. The Court of Appeals Should Not Have Committed the Decision of a Substantial Federal Question to a Court from Which There Is No Possibility of Ultimate Review by the Supreme Court

The Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, between the United States and the United Nations, was approved by the President on July 18, 1947, pursuant to the authority of a joint resolution of Congress of the same date. 61 Stat. 397 (1947). As such, the Trusteeship Agreement is a treaty and a law of the United States as those terms are used in 28 U.S.C.

§ 1331(a), the federal question jurisdictional statute. *B. Altman & Co.* v. *United States,* 224 U.S. 583 (1912). *See also United States* v. *Belmont,* 301 U.S. 324, 330-32 (1937).

The Court of Appeals found that the Trusteeship Agreement created judicially enforceable rights, but held that the doctrine of comity required that such rights be pursued in the High Court of the Trust Territory. App. B at 39a. Only if the High Court refused to hear the claim that the Trusteeship Agreement had been violated, would plaintiffs be permitted to refile the action in the District Court for Hawaii. Id. at 41a. Any other disposition of the case by the High Court, including an adverse interpretation of the Trusteeship Agreement, would not be reviewable in any federal court.

An examination of the High Court makes clear why the doctrine of comity should not be construed to require the ultimate and final interpretation of federal treaty obligations by that court. The High Court is a creature of one of the defendants in this case, the Secretary of the Interior. Dep't. of Interior Order No. 2918, Part IV. Its judges serve at the pleasure of the Secretary. *Id.* There is no statutory provision for review of its decisions by any federal court, including the Supreme Court. [2]

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[2] Of the territories of the United States, only American Samoa lacks access to the federal court system. 48 U.S.C. § 1661. See 28 U.S.C. §§ 41, 1291 (Canal Zone; Guam; Puerto Rico; Virgin Islands). See also Revisor's Note following 28 U.S.C. § 1294 (territories of Hawaii and Alaska); 34 Stat. 815 (U.S. Court for China); *Dorr* v. *United States,* 195 U.S. 138 (1904) (Philippines). The since repealed R.S. §§ 702, 1909-11 (1878) gave the Supreme Court appellate jurisdiction over the supreme court of any territory of the United States.

The notion of comity is used in two distinct senses in American jurisprudence. As between federal courts and state courts, comity is based on considerations of federalism, the recognition of the powers reserved to the states under the United States Constitution. *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). In its second sense, comity describes the principles governing the deference given by one sovereign nation to the legislative, executive or judicial acts of another sovereign nation. *Hilton* v. *Guyot,* 159 U.S. 113 (1895). *See also Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 408-09 (1964). In neither sense does application of the doctrine of comity permit the referral of this case to the High Court of the Trust Territory.

No court other than the Court of Appeals below has considered whether the deference shown by federal courts toward state courts should also be shown toward the courts of the Trust Territory. The Supreme Court has considered, however, whether such comity should exist as between the federal courts and the courts of the territories of the United States. In holding the three-judge court statute inapplicable to the Territory of Hawaii, the Supreme Court held that the purpose of protecting state sovereignty was not furthered by treating the Territory of Hawaii as a state. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 377-80 (1949). Where a federal claim is involved, the federal courts do not defer to the courts of a territory. *United States* v. *Fullard-Leo,* 331 U.S. 256, 268-270 (1947); *Yu Cong* v. *Trinidad,* 271 U.S. 500, 522-23 (1926). Because of the unique federal status of the Trust Territory and the direct United States responsibilities under the Trusteeship Agreement, there is even less reason here

for the federal courts to defer the resolution of federal claims to the courts of the Trust Territory. Relegation of such claims to the courts of the Trust Territory would lead to the anomalous situation in which ultimate review of a federal-question determination could not be sought in any federal court, including the Supreme Court of the United States.

Similarly, the principles of comity governing the relationship between the courts of different sovereign nations have no application to the present case. The District Court made clear that it did not regard the Trust Territory as a foreign country for purposes of sovereign immunity. App. A at 19a. The Court of Appeals, although not discussing that conclusion, in effect affirmed it. The authorities cited in the District Court's opinion establish that the Trust Territory possesses few, if any, of the attributes of an independent sovereign nation.

In effect, the Court of Appeals decision as to comity provides a result precisely opposite from the apparent intent of its holding that the Trusteeship Agreement is judicially enforceable. Application of comity, under the circumstances, makes Interior appointees the final arbiter as to the legality of its own conduct under applicable federal law. Such a situation is contrary to the most fundamental principles of American government and jurisprudence. Principles of comity should not govern the relationship between the United States federal courts and the High Court of the Trust Territory of the Pacific Islands. Petitioners believe they are entitled to a determination of their federal claims under the Trusteeship Agreement in a federal district court.

3. The Failure of the Court of Appeals To Correct the District Court's Reliance on Materials Outside the Complaint on a Motion To Dismiss Without Treating the Motion as One for Summary Judgment Calls for the Exercise of This Court's Power of Supervision

It is fundamental that well-pleaded material allegations in a complaint should be accepted as true unless it appears beyond doubt that plaintiffs can prove no set of facts that would support those allegations. *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). It is equally fundamental that if the District Court intends to treat a motion to dismiss as one for summary judgment, plaintiffs must be provided with ten-day notice and a "reasonable opportunity to present all material made pertinent to such a motion." Federal Rules of Civil Procedure, Rules 12(b), 56(c); *Dale* v. *Hahn,* 440 F.2d 633, 638 & n. 9 (2d Cir. 1971).

The District Court found, on the basis of affidavits and testimony, that the allegations of the complaint concerning involvement of Department of the Interior officials located in Washington, D.C. were unwarranted inferences of fact not to be taken as true on a motion to dismiss.[3] App. A at 22a. Plaintiffs at no time were notified that the defendants' motions to dismiss were to be treated as motions for summary judgment and were not given an opportunity to present materials in support of the allegations in their complaint.

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[3] Plaintiffs' allegations were in no sense frivolous. Indeed, they were supported by official resolutions, cables and letters to and from Interior officials attached as exhibits to the complaint. These revealed that Interior officials in Washington were aware of the controversy concerning the lease and had consulted with the High Commissioner about it.

Throughout the proceedings leading up to the Court's Order, all concerned referred to, and apparently considered the motions as motions to dismiss, dealing only with questions of law. Indeed, the District Court captioned its opinion "Order Granting Motions to Dismiss." The District Court expressly relied upon this finding to hold that NEPA did not apply to the facts before it. Rather than correct such an error, the Court of Appeals extended it, by relying upon "assurances" of the Secretary of noninvolvement of "his department." Based upon this assurance, the Court applied the doctrine of comity to relegate the case to the Trust Territory High Court, despite recognition of High Court holdings that it lacks jurisdiction over agencies of the United States or its officers in the Trust Territory. App. B at 40a. The practical result is that plaintiffs have been deprived of their opportunity to attempt to prove allegations upon which they based important claims. They have had no day in court and there has effectively been a failure of due process as to such claims.

The failure of the Court of Appeals to correct the District Court's departure from the required procedure and its own improper reliance upon an assurance by a litigant as to a disputed question of fact, are of sufficient gravity to call for the exercise of this Court's supervisory power. See *Carter* v. *Stanton*, 405 U.S. 669 (1972).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

D. HAWAII

Civ. No. 72-3720.

The PEOPLE OF SAIPAN, By and Through HERMAN Q. GUERRERO et al., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF INTERIOR et al., *Governmental Defendants*,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation, *Corporate Defendant*.

March 20, 1973.

* * * * * * * * * *

Order Granting Motions To Dismiss

SAMUEL P. KING, District Judge.

This case involves the application of the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. § 4321 et seq. (Supp. 1973), to the official actions of the High Commissioner of the Trust Territory of the Pacific Islands (hereinafter "Trust Territory").[1] Defendants have moved to dismiss the Complaint on a variety of procedural and substantive grounds. These grounds raise the issues now before the court.

[1] The islands of the Trust Territory are located in the Western Pacific Ocean north of the Equator. There are approximately 96 island units, various small islands or atolls, which are scattered over an oceanic area larger than the continent of Australia or continental United States. The islands total land area, however, is only 687 square miles, and only 64 are regularly inhabited. See Trust Territory of the Pacific Islands 1960, 13th Annual Report to the United Nations (Dept. of State publication 7183, 1961).

The High Commissioner is the highest official in the executive branch of the Trust Territory Government. See *infra* at 655.

Plaintiffs, citizens of the Trust Territory who are residents of Saipan, Mariana Islands, allege that the action of the High Commissioner in approving and later executing a lease agreement with Continental Airlines, Inc. (hereinafter "Continental") to construct and operate a hotel on public land adjacent to Micro Beach, Saipan, unlawfully bypasses NEPA because no environmental impact statement was prepared or considered prior to approval of the lease, and is "an abuse of discretion" within the meaning of the judicial review provisions of the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §§ 701-706, because the environmental implications of the project were not given bona fide consideration. It is further alleged that the High Commissioner has an affirmative fiduciary duty to comply with NEPA under the provisions of the Trusteeship Agreement for the Former Japanese Mandated Islands.[2] An injunction is sought prohibiting the implementation of the lease agreement until the environmental impact of the hotel has been studied and evaluated.

In addition to the immediate parties to the lease (Continental and the High Commissioner), plaintiffs have joined as defendants the Department of the Interior, Secretary of the Interior Rogers C. B. Morton and Deputy Assistant Secretary of the Interior for Territorial Affairs Stanley S. Carpenter. As discussed *infra* at 653, plaintiffs assert that the Department of the Interior has responsibility for the civil administration of the Trust Territory and that the High Commissioner acts as an agent of the Department in his role as chief executive of the Trust Territory Government.

On January 10, 1973, this court denied a temporary restraining order after a hearing and requested further brief-

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[2] 61 Stat. 3301 (hereinafter "Trusteeship Agreement"). The Trusteeship Agreement was approved by the Security Council of the United Nations on April 2, 1947, and by the President of the United States on July 18, 1947, pursuant to a Joint Resolution of Congress of that date.

ing on the complex questions of law that had been raised. Thereafter defendants moved to dismiss and argument was heard on February 13, 1973. The hearing on the preliminary injunction was postponed pending decision on the motions to dismiss.

After extensive consideration, it is my reluctant conclusion that: (1) the Trust Territory Government is not a federal agency subject to judicial review under the APA or NEPA, and (2) the Trusteeship Agreement does not vest plaintiffs with individual legal rights which they may assert in this court. For these reasons, jurisdiction is lacking and the motions to dismiss are granted. The other grounds urged in support of dismissal are without merit, and are rejected.

Facts

On the basis of the well pleaded allegations of fact in the Complaint, which are taken as admitted for the purpose of these motions, it appears that sometime prior to October 20, 1970, Continental applied to the Trust Territory Government for permission to lease and build a hotel on public land at a site adjacent to Micro Beach, Saipan.

Micro Beach is a pleasant shaded beach which for many years has been the favorite beach of the people of Saipan. It is an important historical and cultural site and even during the previous German and Japanese administrations, it was set aside as an area to be preserved for use by the people of the island.

Although the hotel site is not directly on the beach, its proximity makes "it inevitable that construction of a hotel there will greatly reduce the desirability of Micro Beach to the people of Saipan and will, as a practical matter, deprive them of use of their most popular beach. In any society, a large increase in the number of persons using a beach or similar recreation area can greatly reduce the desirability of the area as a place to visit and relax. This is particularly true in Saipan, where many of the people,

whether it be because of diffidence, courtesy, general cultural values or a long history of exposure to highhanded outsiders, do not feel free to use a beach occupied by tourists." Complaint ¶ 21.

In addition, it is alleged that construction of the hotel will triple the number of hotel rooms presently on Saipan resulting in further strain on the already overburdened power and water supplies, and damage to the ocean and reef by increased amounts of sewage discharge.

Pursuant to the requirements of the Trust Territory Code (hereinafter "T.T.C."), the Continental application was submitted to the Mariana Islands District Land Advisory Board[3] for its consideration. The Board unanimously recommended against the application suggesting that the area be reserved for public park purposes. This decision was communicated to the District Administrator of the Marianas District[4] and the High Commissioner by

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[3] All members of the Land Advisory Board are Trust Territory citizens and are appointed by the Mariana Islands District Administrator with the advice and consent of the Mariana Islands District Legislature. 67 T.T.C. § 53. See footnote 4, *infra*.

[4] Saipan is part of the Mariana Islands District. For the purpose of administration, the islands of the Trust Territory are grouped into six districts, each with its own administrator and legislature. Subject to all territory-wide laws, the district governments are primarily responsible for support of public education and health, imposition and collection of sales taxes, construction and maintenance of secondary roads, domestic relations, inheritance law, land law, issuance of licenses for wholesale business and liquor control. 3 T.T.C. § 2.

Each district administrator is appointed by and serves at the pleasure of the High Commissioner. 3 T.T.C. § 51. In addition to his duties as representative for the High Commissioner, the district administrator is the chief executive officer of the district government. 3 T.T.C. § 52. (The court is informed that the Code has been amended to require the advice and consent of the Congress of Micronesia for all future appointments of district administrators).

letter dated October 20, 1970. See Exhibit B of the Complaint.

For approximately one year no apparent action on the hotel project was taken. Then on October 15, 1971, a Micronesian News Service [5] release announced that the Trust Territory Government had tentatively approved a lease of the site to Continental "with final approval awaiting receipt of the completed papers." Complaint ¶ 25. Thereafter, protests against the proposal by various elected and community leaders, the Saipan Municipal Council [6] and the Mariana Islands District Legislature were communicated to the Interior Department and the High Commissioner.[7] Nevertheless, the lease was executed by Continental and High Commissioner Johnston on behalf of the Trust Territory Government on January 1, 1972.

The lease is for an initial period of 30 years with options to extend for two additional periods of 10 years each. Lease Agreement, arts. 1 and 2. Continental is granted the right to construct 200 rooms on the premises,[8] *id.* art. 27, and

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[5] The Micronesian News Service is part of the Trust Territory Government's Department of Public Information.

[6] The Saipan Municipal Council represents a third layer of government subordinate to the Trust Territory Government and the Mariana Islands District Government. Such councils are chartered by the High Commissioner when in his opinion such action is warranted by the circumstances and by the stage of development of the community. 4 T.T.C. § 1. They are subject to all territory-wide laws and all district laws of their respective districts. 4 T.T.C. § 51.

[7] Defendants have submitted a petition signed by various people in the Mariana Islands District supporting construction of the hotel. Defendants Exhibit 6. Plaintiffs admit that the project "is not without support" among the people of Saipan.

[8] Plaintiffs allege that the hotel is to be eventually expanded to 500 rooms.

with the prior written permission of the Trust Territory Government to erect on the "public beach and in the waters of the lagoon adjacent thereto, facilities and structures, including docks and ramps related to and connected with marine and beach activities" of Continental's hotel. *Id.* art. 6.

It is undisputed that defendants have not complied with the requirements of NEPA, specifically section 4332(2)(C) which requires that "all agencies of the Federal Government" prepare a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment."

NEPA Is Applicable in the Trust Territory

Defendants first ground in support of their motions to dismiss is that NEPA is not applicable to federal agencies operating in the Trust Territory. They urge this court to reconsider its recent decision in Enewetak v. Laird, 353 F.Supp. 811 (D. Hawaii decided January 19, 1973) holding that NEPA does apply to such agencies. It is argued that because there is no specific language in NEPA extending the statute's coverage to the Trust Territory, this court must restrict its application to the territorial jurisdiction of the United States. Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 680 (1949), is cited for this proposition, particularly language at page 285 of the opinion, 69 S.Ct. at page 576 which states that "the canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained."

I am not persuaded. In my opinion, defendants misconstrue the thrust of the canon by ignoring the qualifying phrase "unless a contrary intent appears."

The question before the Court in *Foley Brothers* was whether the Eight Hour Law[9] applied to a contract between the United States and a private American contractor for work performed on a construction project in Iraq and Iran. As noted by Justice Frankfurter, a literal reading of the statute would have resulted in its application since by its terms it covered "every contract made to which the United States . . . is a party." 336 U.S. at 291-292, 69 S.Ct. at 581 (concurring opinion). Instead, the Court looked to the Act as a whole, *id.* at 285-286, 69 S.Ct. 575, its legislative history, *id.* at 286-288, 69 S.Ct. 575, and administrative interpretations of it. *Id.* at 288-291, 69 S.Ct. 575. Finding nothing in any of this material that indicated a congressional purpose to extend the Act's coverage beyond the territorial jurisdiction of the United States, the Court concluded that the law was "inapplicable . . . in a foreign country over which the United States has no direct legislative control. . . ."[10] *Id.* at 290, 69 S.Ct. at 580.

Thus the Court did not adopt the mechanical rule proposed by defendants. Rather it looked to all available evidence of legislative intent before it arrived at a decision.

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[9] The Eight Hour Law was repealed August 13, 1962. 76 Stat. 360. It had provided that "[e]very contract hereafter made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work; . . ."

[10] It is interesting to note that while the United States does not have sovereignty in the Trust Territory, it very definitely has legislative control. As noted *infra* at 655, Department of the Interior Order No. 2918, pt. III § 2 provides that the Congress of Micronesia may not enact legislation inconsistent with the "treaties or international agreements" of the United States, "laws of the United States applicable to the Trust Territory," "Executive Orders of the President" and "Orders of the Secretary of the Department of Interior." See also, 2 T.T.C. § 102.

Though a different result was reached, this is exactly the procedure followed in *Enewetak.*[11] Because this court concluded that both the language and legislative history of NEPA evidenced a congressional intent to apply the statute to all areas under United States control, the canon of construction cited by defendants "whereby unexpressed congressional intent may be ascertained" never became an issue.

No other reasons appearing for a reconsideration of this court's decision in *Enewetak,* it is reaffirmed and defendants' arguments rejected.

VENUE IS PROPERLY LAID IN THE DISTRICT OF HAWAII

Defendants Continental and High Commissioner Johnston contend that venue is improperly laid in this district because the Department of the Interior and its officials have not legally or adequately been served with process.

Plaintiffs rely on 28 U.S.C. § 1391(e) (Supp.1973) as authorization for effective extra-territorial service:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may . . . be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

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[11] Indeed, in every reported case requiring judicial interpretation of the applicability of ambiguous legislation to the Trust Territory, the courts have looked to all available evidence to discover the intent of Congress. See Aradanas v. Hogan, 155 F.Supp. 546 (D.Hawaii 1957) (Immigration and Nationality Act); Application of Reyes, 140 F.Supp. 130 (D.Hawaii 1956) (Immigration and Nationality Act); Callas v. United States, 253 F.2d 838 (2d Cir. 1958) (Tort Claims Act); Brunell v. United States, 77 F.Supp. 68 (S.D.N.Y.1948) (Tort Claims Act).

It is first argued that the section is not applicable here because the requirement that "each defendant" be an officer or employee of the United States is violated by the joinder of Continental, a private corporation. Though this argument is supported by the literal language of section 1391(e), it is obviously inconsistent with the spirit and intent of the provision. See Judge Body's discussion in Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Development, 284 F.Supp. 809, 832-834 (E.D.Pa. 1968). The better rule, supported by virtually all courts which have considered this problem,[12] is that the requirement refers only to defendants who are beyond the forum's territorial limits. Thus the presence of Continental is simply not relevant to the extra territorial operation of section 1391(e).[13]

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[12] Powelton Civic Howe Owners Ass'n. v. Department of Housing & Urban Development, *supra* at 832-834; Liberation News Service v. Eastland, 426 F.2d 1379, 1382 n. 5 (2d Cir. 1970); Kletschka v. Driver, 411 F.2d 436, 442 (2d Cir. 1969); Brotherhood of Locomotive Engineers v. Denver & R.G.W. R.R., 290 F.Supp. 612, 615-616 (D.Colo.1968), aff'd. on other grounds, 411 F.2d 1115 (10th Cir. 1969); Coalition for United Community Action v. Romney, 316 F.Supp. 742, 746-747 (N.D.Ill.1970); McKenna v. Udall, 135 U.S.App.D.C. 335, 418 F.2d 1171, 1176 (1969); Heath v. Aspen Skiing Corp., 325 F.Supp. 223, 229 (D.Colo.1971); English v. Town of Huntington, 335 F.Supp. 1369, 1373 (E.D.N.Y.1970), aff'd. on other grounds, 448 F.2d 319 (2d Cir. 1971); Macias v. Finch, 324 F.Supp. 1252, 1254-1255 (N.D.Cal.1970). *Contra*, Chase Savings & Loan Ass'n. v. Federal Home Loan Bank Board, 269 F.Supp. 965, 967 (E.D.Pa.1967).

[13] Defendant Continental resides in this district because it does business here, see 28 U.S.C. § 1391(c) (Supp.1973), and was personally served pursuant to Rules 4(d)(3) and 4(b) of the Federal Rules of Civil Procedure. Defendant High Commissioner Johnston was personally served in this district on January 15, 1973. He has not raised any specific venue objections although he has moved this court to quash a subpoena issued to require the taking of his deposition. In view of my conclusion that the High Commissioner is an official of the Department of the Interior,

Secondly, it is asserted that with respect to the Interior Department and its officials venue is improperly laid in this district because none of the requirements set out in subsections (1) through (4) of section 1391(e) have been met. It is suggested that proper venue would be in Washington, D. C., the official residence of these defendants.

It is not necessary to decide this question because the Interior Department, Secretary Morton and Deputy Assistant Secretary Carpenter have all waived their objections to venue.[14] Because venue is a privilege personal to each defendant, Continental and Johnson are precluded from objecting that venue is improper as to the other defendants. Camp v. Gress, 250 U.S. 308, 39 S.Ct. 478, 63 L.Ed. 997 (1919); McKenna v. Udall, 135 U.S.App.D.C. 335, 418 F.2d 1171, 1176-1177 (1969).

PLAINTIFFS HAVE STANDING

Defendants move on two separate grounds to dismiss the Complaint because plaintiffs lack standing: (1) plaintiffs have failed to allege the requisite interest in the contro-

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infra, at 657-658, he would be subject to extra-territorial service to the same extent as any other official in the Department. While the APA exclusion precludes judicial review in most instances, there is no reason to believe that it provides an exemption from the venue statutes.

[14] The reason for their waiver is found in Exhibit B of the Governmental Defendants Memorandum in Support of Motion to Dismiss which is a letter from the Department of Interior to the Department of Justice dated January 24, 1973. On page 7 it is stated:

> 5. We believe your Department is better qualified to evaluate the venue question. We might note, however, that since *General Constructors* is a valuable precedent for the Hawaii District, it might be better to stay there, particularly since review would be in the Ninth Circuit which we think would be more knowledgeable about and sympathetic to our position than would the D.C. Circuit.

versy as defined by Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 36 (1972); and (2) as nonresident aliens, plaintiffs have no standing to sue, relying on Pauling v. McElroy, 107 U.S.App.D.C. 372, 278 F.2d 252 (1960). Both arguments are without merit.

In Sierra Club v. Morton, *supra,* the Sierra Club sought a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. The Supreme Court held that the Club lacked standing because it had asserted no individualized harm to itself or its members: "Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." 405 U.S. at 735, 92 S.Ct. at 1366.

In the instant case plaintiffs clearly have alleged facts in the Complaint which satisfy the *Sierra Club* test. Paragraph 3 of the Complaint states that:

> Most of the plaintiffs regularly use Micro Beach in Saipan for swimming, fishing and picnicking, and regard it as one of their favorite beach areas in Saipan. They would be effectively deprived of their use of Micro Beach if construction of the Continental hotel takes place as presently contemplated.

In addition, paragraph 35 alleges that the hotel will create a sewage problem, paragraphs 36 and 37 that it will deleteriously affect the power and water supply, and paragraph 39 that its height will have "a significant aesthetic effect upon the people of Saipan." By such allegations, plaintiffs have shown that they will be "adversely affected" by the construction of the hotel and that they have more than merely general "interest in the problem." See Sierra Club v. Morton, *supra,* 405 U.S. at 739-740, 92 S.Ct. 1361.

Moreover, in view of this court's conclusion that NEPA is applicable in the Trust Territory, plaintiffs' status as nonresident aliens does not detract from their standing to sue. Enewetak v. Laird, *supra* 353 F.Supp. at 820 n. 14. Nor do they lack standing under the APA. Constructores Civiles de Centroamerica, S. A. v. Hannah, 148 U.S.App. D.C. 159, 459 F.2d 1183, 1189-1191 (1972). The footnote in Pauling v. McElroy, *supra* 278 F.2d at 254 n. 3, to the effect that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States" is an incomplete statement of the law.[15] There are many instances where nonresident aliens have been allowed to sue in United States courts to protect their property or personal rights.[16] Indeed, the Supreme Court has said that "[a]lien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to

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[15] The District of Columbia Circuit has subsequently "clarified" its holding in Pauling v. McElroy. In Constructores Civiles de Centroamerica, S.A. v. Hannah, *supra* 459 F.2d at 1190 n. 13, it stated:

> Citing Johnson v. Eisentrager, *supra* [339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255], we have denied standing to nonresident aliens *who have not alleged specific threatened injury* in challenging the detonation of a nuclear device. Pauling v. McElroy, 107 U.S.App.D.C. 372, 278 F.2d 252 (1960). (Emphasis added).

[16] See, e.g., Wilderness Society v. Morton, 463 F.2d 1261 (D.C. Cir.1972) (Canadian environmental group allowed to intervene in federal district court suit testing Interior Secretary's compliance with NEPA prior to granting Alaska pipeline permits); Constructores Civiles de Centroamerica, S.A. v. Hannah, *supra* (Honduran corporation had standing to sue Agency for International Development in connection with disqualification of the corporation as a bidder on road construction contract); Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43 (5th Cir. 1966) (Mexican corporation owning Mexican end of a Rio Grande River bridge had standing to sue for injunction restraining construction of new bridge by city on grounds that city had failed to secure congressional consent for the new structure).

resort to the courts for the redress of wrongs and the protection of their rights." The Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578, 28 S.Ct. 337, 339, 52 L.Ed. 625 (1908).

Accordingly, this court will not deny plaintiffs standing in this suit because of their status as nonresident aliens where no such congressional intent is manifested in either NEPA or the APA.

Abstention Not Required

Defendants note that an identical suit is pending in the High Court of the Trust Territory and request that this court abstain from further proceeding until such time as that suit is concluded.

Without getting into the difficult question of what deference is required as a general rule with respect to cases pending in the High Court, it does not appear that abstention is required in this case. Although the case in the High Court arose from the same transaction as did this one, it does not include all the defendants named herein and it appears that the primary issue remaining before that court involves the construction of a Trust Territory statute not at issue here. Moreover, the Chief Justice of the High Court has entered an order denying a motion by Continental and the High Commissioner which sought to enjoin the plaintiffs from pursuing their remedies in this court. He also, on his own motion, stayed further proceedings in the High Court during the pendency of the action in this court.

Under the circumstances, abstention would serve little purpose and might well lead to unnecessary expense and duplication of effort.

The Trust Territory Government Is Not a Federal Agency Subject to Review Under NEPA or the APA

By its terms NEPA is applicable only to major actions of "agencies of the Federal Government." See 42 U.S.C.

§ 4332 (Supp.1973). Defendants assert that the Trust Territory Government is not such an agency because (1) the Trust Territory is a foreign country and its government immune to suits in United States courts, or alternatively (2) that the Trust Territory Government is a government of a United States territory or possession within the meaning of 5 U.S.C. § 701(b)(1)(C) and excluded from judicial review.[17]

Under international law the Trust Territory occupies a unique position. By virtue of Article 3 of the Trusteeship Agreement the United States has "full powers of administration, legislation, and jurisdiction" over the territory, allowing in practical effect the exercise of full sovereign power although technically sovereignty resides elsewhere.[18] Beyond these full administrative powers normally granted to administering authorities in United Nations trusteeship

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[17] The APA, which provides for judicial review of "agency action," see 5 U.S.C. § 702, defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 701(b)(1). However, it is further provided that this definition does not include, inter alia, "the governments of the territories or possessions of the United States." 5 U.S.C. § 701(b)(1)(C).

[18] As noted by Francis D. Sayre, United States Representative in the Trusteeship Council and President of the Council, in his learned article on "Legal Problems Arising from the United Nations Trusteeship System," 42 Am.J.Int'l.L. 263, 271 (April, 1948):

> In the first place, there seems to be general concurrence with respect to the present trust territories, as there was with respect to the mandated territories, that wherever sovereignty does rest it is not in the administering power. This view has been re-enforced by statements of the United States, the United Kingdom and Australia as administering authorities of trust territories. Each of these has stated on separate occasions that it does not regard its administration of the trust territory as implying any claim of sovereignty.

agreements,[19] the Trust Territory is the only area designated as a "strategic" trust. Trusteeship Agreement, art. 1. This designation results in the United States being responsible to the Security Council for administration of the Trust Territory—where the United States possesses veto power [20]—rather than the General Assembly. It also permits preferential treatment of the United States in economic and commercial matters,[21] and allows this country unilaterally to declare all or any part of the islands a closed area within which the United States may determine the extent to which trustee functions shall be exercised and from which it may bar anyone, including the United Na-

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[19] After World War II, eleven trusteeships were set up pursuant to agreements between the United Nations and various nations. The United States' administration of the Trust Territory and Australia's administration of New Guinea are the only trusteeships still in effect.

[20] See Article 27 of the Charter of the United Nations.

[21] See Article 8(1) of the Trusteeship Agreement which provides:

> In discharging its obligations under Article 76(d) of the [United Nations] Charter . . . the administering authority . . . shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation *except the administering authority.* (Emphasis added).

This article is the same as that contained in the draft trusteeship agreement submitted by the United States. The comment accompanying the United States proposal made it clear that the basis for preferential treatment of the United States was the "strategic" status of the Trust Territory. See Draft Trusteeship Agreement for the Japanese Mandated Islands, With Article by Article Explanatory Comments, (Department of State Publication, February 26, 1947) at 5-6, in 1 Whiteman, Digest of Int'l Law 810-811 (Released June, 1963).

tions.[22] See the dissent of Judge Lumbard in Callas v. United States, 253 F.2d 838, 842-844 (2d Cir. 1958).

Finally, in common with all trusteeship agreements negotiated with the United Nations, the Trusteeship Agreement may not be altered, amended or terminated without the consent of the United States. Trusteeship Agreement, art. 15.

The Congress authorized the President to vest the administrative power conferred on the United States by the Trusteeship Agreement "in such person or persons" to be exercised "in such manner and through such agency or agencies as the President . . . may direct or authorize." 48 U.S.C. § 1681(a) (Supp.1973). In Executive Order 11021, 3 C.F.R. 600 (1959-63 Compilation), 48 U.S.C. § 1681 (Supp.1973), the President delegated authority to the Secretary of the Interior as follows:

> Section 1. *Responsibility of Secretary of the Interior.* The responsibility for the administration of civil government in all of the trust territory, and all executive, legislative, and judicial authority necessary for that administration, are hereby vested in the Secretary of the Interior. . . . [T]he Secretary . . . shall take such actions as may be necessary and appropriate to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement and under the Charter of the United Nations. . . .

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[22] See Article 13 of the Trusteeship Agreement which provides:

> The provisions of Article 87 and 88 of the [United Nations] Charter [relating to reports, petitions, visits and questionnaires concerning non-strategic areas] shall be applicable to the trust territory, *provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.* (Emphasis added).

See also discussion in 1 Whiteman, *supra* at 824-830.

> Sec. [sic] 2. *Redelegation of authority.* The executive, legislative, and judicial authority provided for in section 1 of this order may be exercised through such officers or employees of the Department of the Interior, or through such other persons under the jurisdiction of the Secretary of the Interior, as the Secretary may designate, and shall be exercised in such manner as the Secretary, or any person or persons acting under the authority of the Secretary, may direct or authorize.

Pursuant to this authority, the Secretary issued a series of Secretarial Orders dealing with the civil administration of the Trust Territory which have been superseded and consolidated in Department of the Interior Order No. 2918 (December 27, 1968) (hereinafter "Order No. 2918"). This Order, as amended, creates a basically republican form of government in the Trust Territory with executive, legislative and judicial branches.

Executive authority is vested in the High Commissioner to "be exercised and discharged under the supervision and direction of the Secretary." Order No. 2918, pt. II § 1. The High Commissioner is appointed by the President of the United States with the advice and consent of the Senate. 48 U.S.C. § 1681(a) (Supp.1973). Thus his authority does not come from the people of the Trust Territory, nor do they have any method of removing him when dissatisfied with his actions or policies.

Legislative authority has been delegated to the Congress of Micronesia, consisting of a Senate and House of Representatives, whose members are elected by the citizens of the Trust Territory. Order No. 2918, pt. III §§ 1, 2, 5, 7 and 8. The power of the Congress is circumscribed, however, by the provision that it may not enact legislation inconsistent with the laws of the United States applicable to the Trust Territory, treaties or international agreements of the United States, Executive Orders of the President or orders

of the Secretary of the Interior. *Id.* § 2. Moreover, every bill passed by the Congress is subject to veto by the High Commissioner. His veto may be overridden by a two thirds majority of the entire membership of both Houses, but the re-enacted bill is still subject to veto by the Secretary of the Interior. The Secretary's action is final and may not be overridden. *Id.* § 13.

Judicial authority is vested in High Court which is independent of the executive and legislative powers. Order No. 2918, pt. IV. The Secretary appoints the Chief Justice and all Associate Justices free from any control by the Congress of Micronesia.

In addition, Order No. 2918 specifies that the relations of the Trust Territory Government with the Congress of the United States on all legislative matters, including appropriations, shall be conducted through the Department of the Interior. Pt. II § 2. Likewise, contact with other Federal agencies and communications with foreign governments and international bodies must go through and be cleared by the Department. Pt. II §§ 4 and 5.

Upon consideration of all of the above, it is my opinion that the United States exercises a maximum degree of control which is inconsistent with the assertion that the Trust Territory is a foreign country. My decision is reinforced by the fact that there does not appear to have been any significant delegation of authority to the citizens of the Trust Territory.[23] The United States, acting through the Secretary of the Interior, controls the High Commissioner and retains an absolute veto over all legislation enacted by

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[23] The court is informed that this situation will probably change as a result of the Micronesian Future Political Status Talks now under way between Ambassador Franklin Williams of the United States and representatives of the Congress of Micronesia. See Official Record of the Fourth Round of Micronesian Future Political Status Talks (Released by the Office of Micronesian Status Negotiations, Washington, D. C. 1972). However, at the time of the filing of this action, Order No. 2918 was still in full effect.

the Congress of Micronesia. Accordingly, without determining exactly what status the Trust Territory occupies, I hold that it is not a foreign country entitled to immunity from suits in United States courts.

The cases cited by defendants for the proposition that the Trust Territory is a foreign country are not to the contrary. Brunell v. United States, 77 F.Supp. 68 (S.D.N.Y. 1948) and Callas v. United States, 253 F.2d 838 (2d Cir. 1958) turn on a construction of the term "foreign country" as used in the Tort Claims Act. See 28 U.S.C. § 2680(k). Similarly, Application of Reyes, 140 F.Supp. 130 (D. Hawaii 1956) and Aradanas v. Hogan, 155 F.Supp. 546 (D. Hawaii 1957) construe the term "foreign state" as used in the Immigration and Nationality Act. See 8 U.S.C. § 1101 (a)(14). None of these cases go outside the scope of the particular act under consideration [24] and the legal status of the Trust Territory Government was never an issue.

While avoiding the Trust Territory Government's claim of sovereign immunity as the government of a foreign country, plaintiffs cannot also avoid the APA's exclusion of "the governments of the territories or possessions of the United States" from judicial review. 5 U.S.C. § 701 (b)(1)(C). Admittedly, the Trust Territory is technically not a territory or possession because the United States does not have sovereignty. This distinction is immaterial, however, because the legislative history of the APA makes it clear that Congress intended to exclude from judicial review *all* governments created pursuant to the authority of Congress.

Senator McCarran, Chairman of the Senate Judiciary Committee, made these remarks in reporting on the Sen-

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[24] See Brunell v. United States, *supra* 77 F.Supp. at 69, 72; Callas v. United States, *supra* 253 F.2d at 840; Application of Reyes, *supra* 140 F.Supp. at 131-132; Aradanas v. Hogan, *supra* 155 F.Supp. at 547.

ate Bill that, with only minor clarifications and corrections, was enacted as the APA:

> As it has been reported to the Senate, the committee feels that it has avoided the mistake of attempting to over-simplify this measure. It has not hesitated, therefore, to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, *the committee has followed the undeviating policy of dealing with types of functions as such and in no case dealing with administrative agencies by name.* That point is important, and I will repeat it if I may. The committee has not deviated from the policy of dealing with types of functions as such, and the bill in no case deals with administrative agencies by name. (Emphasis added). 92 Cong.Rec. 2150 (1946).

This theme is reiterated in the House Judiciary Committee Report:

> Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. *The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms.* (See sec. 2(a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment. (Emphasis added). H.Rep.No.1980, in 1946 U.S. Code Cong. & Ad.News 1195, 1205.

In view of this clearly expressed congressional intent to operate "across the board" and exempt "all like agencies . . . in general terms," this court concludes that the Trust Territory Government is excluded from review under sec-

tions 701 to 706 of the APA. The fact that the United States is technically without sovereignty in the Trust Territory is, under the circumstances, a distinction without a difference.

This conclusion is supported by reference to United States administration of American Samoa. Its government is virtually identical to that of the Trust Territory insofar as the power of the Secretary of the Interior or the important Samoan governmental bodies are concerned.[25] Judge Tavares of this district held that the APA exclusion is applicable to the civil government in Samoa. General Constructors Company of Nevada v. Morton, Civ. No. 71-3409 (D. Hawaii decided September 16, 1971) (Unpublished Opinion). Thus under the rule that all like agencies should be exempted from the operation of the APA, the Trust Territory Government should likewise be excluded.[26]

Plaintiffs argue that a distinction must be drawn between the High Commissioner and the other branches of the Trust Territory Government, and that in order to prevail they need only establish that the High Commissioner is a "federal agent." See Plaintiffs' Memorandum in Response to Defendants' Motions to Dismiss at 3-18. While I accept plaintiffs' argument that under general principles of agency law and court decisions defining the term "federal

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[25] Compare 48 U.S.C. § 1661(c) (Supp. 1973) with 48 U.S.C. § 1681(a) (Supp. 1973); Executive Order No. 10264, 16 F.R. 6419, with Executive Order No. 11021, 3 C.F.R. 1959; Department of the Interior Order No. 2657, as amended, with Department of the Interior Order 2918, as amended.

[26] See Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956), where it was held that the government of the Virgin Islands, including two municipalities into which it was divided, was not a "federal agency" within the meaning of the Tort Claims Act, nor was the Superintendent of Public Works of one of these divisions an officer or employee of a federal agency while he was supervising the maintenance of streets even though his salary was paid from federal funds, and he was appointed by the Secretary of the Interior.

agency",[27] the High Commissioner and his immediate subordinates in the executive branch of the Trust Territory Government are federal officials operating as a component of the Department of the Interior, it does not alter my conclusion that the APA exclusion is applicable in this case. To exempt federal officials serving as officers of the governments of the territories and possessions from United States laws governing federal agency action was obviously the reason for the exclusion. Whether the Trust Territory Government is considered as a whole, or the High Commissioner by himself, the result is the same.[28]

Having concluded that the Trust Territory Government is exempt from judicial review under the APA it follows that it is also immune under the provisions of NEPA. No reason is apparent—and plaintiffs cite none—why the same rules on the scope of review should not be applied. Accordingly, the action of High Commissioner Johnston approving and executing the lease agreement is not "federal" action within the meaning of NEPA.

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[27] See, e.g., Domenech v. National City Bank, 294 U.S. 199, 55 S.Ct. 366, 79 L.Ed. 857 (1935); Standard Oil Co. of California v. Johnson, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); Korman v. Federal Housing Administrator, 72 App. D.C. 245, 113 F.2d 743 (1940); Lassiter v. Guy F. Atkinson Co., 176 F.2d 984 (9th Cir. 1949).

[28] On the basis of affidavits submitted by the parties and testimony at the hearing on the Motion for a Temporary Restraining Order and again at the hearing on the Motions to Dismiss, it is clear that plaintiffs' allegations that the decision to approve the lease agreement was made or dictated by officials in the Department of the Interior are without foundation. The lease approval was a "local" decision of the High Commissioner acting within the scope of his duties as chief executive of the Trust Territory Government. The officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form. Because unwarranted inferences of fact may not preclude dismissal, see 2A Moore's Federal Practice § 12.08, this allegation has not been admitted for the purposes of these motions.

APPROVAL OF THE LEASE AGREEMENT IS MAJOR ACTION WITHIN THE MEANING OF NEPA

Though their argument is not entirely clear, it appears that defendants assert not only that the High Commissioner's approval of the lease agreement is not federal agency action but that it is not "major" action within the meaning of NEPA.

This contention has been settled adversely to defendants by Davis v. Morton, 469 F.2d 593 (10th Cir. decided November 24, 1972). The issue in that case was whether approval by the Secretary of the Interior of a 99-year lease of Indian lands executed by an Indian tribe and a development company constituted major federal action. The United States did not initiate the lease, was not a party, possessed no interest in either the lease or the development, and did not participate financially or benefit from the lease in any way. Nonetheless, the Court held that "approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates." 4 E.R.C. at 1738. See also, Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972) (License to construct a high voltage power line conceded by all parties to be a major action); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C.1971) (Issuance of an interim operating license for a nuclear power plant held to be major action); City of New York v. United States, 337 F.Supp. 150 (E.D. N.Y.1972) (Interstate Commerce Commission order authorizing abandonment of a railroad line held to be major action).

Thus it is clear that the approval and execution of the lease of public lands in the instant case is "major" action within the meaning of NEPA.

TRUST TERRITORY GOVERNMENT DOES NOT HAVE SOVEREIGN IMMUNITY WHEN SUED FOR VIOLATIONS OF AN ACT OF CONGRESS

Defendants claim that action against High Commissioner Johnston is actually directed against the Trust Territory

and is therefore barred by sovereign immunity.[29] To the extent that this claim is based on their previous argument that the Trust Territory is a foreign country, it has already been rejected. However, defendants also argue that the Trust Territory possesses attributes of sovereignty equivalent to a state government, relying principally on Kawananakoa v. Polybank, 205 U.S. 349, 27 S.Ct. 526, 51 L.Ed. 834 (1907).

It appears to be clear that there are degrees or attributes of sovereignty, and that a government may be entitled to and enjoy some of these attributes without necessarily having all of them.

In the *Kawananakoa* case, Justice Holmes held that the Territory of Hawaii was immune from suit without its consent on the following basis:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the right depends....*
>
> As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might

[29] Of course, sovereign immunity would be no defense if the Trust Territory Government had been construed to be a federal agency subject to judicial review under NEPA and the APA. See Kalur v. Resor, 335 F.Supp. 1, 8-9 (D.D.C.1971).

> intervene, just as in the case of a state the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. 205 U.S. at 353-354, 27 S.Ct. at 527. (Emphasis added).

In the instant case, the same principles apply.

As previously discussed, the Trusteeship Agreement gives the United States full powers of legislation in the Trust Territory. With respect to local matters, this power has been delegated to the Congress of Micronesia along the lines followed in organizing the territories and possessions of the United States. On the basis of the principles outlined in *Kawananakoa,* I believe that this delegation of local legislative power gave the Trust Territory what has been referred to as "quasi-sovereignty" or "qualified sovereignty," carrying with it the attribute of immunity from suit without its own consent. See Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 33 S.Ct. 352, 57 L.Ed. 507 (1913); People of Puerto Rico v. Shell Co., 302 U.S. 253, 58 S.Ct. 167, 82 L.Ed. 235 (1952); Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956); Harris v. Municipality of St. Thomas and St. John, 212 F.2d 323 (3rd Cir. 1954).

This immunity, however, cannot be extended to include suits under a statute of the United States applicable in the Trust Territory. Such statutes confer rights which are not dependent on local authority—indeed, they supersede local law [30]—and thus are not within the rule set out in *Kawananakoa.* Near the end of the opinion Justice Holmes

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[30] Order No. 2918, pt. III § 2(b) provides:

> *Legislative Power.* The legislative power of the Congress of Micronesia shall extend to all rightful subjects of legislation, except that no legislation may be inconsistent with
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> • • • • • • • • • • •
>
> (b) laws of the United States applicable to the Trust Territory. . . .

specifically notes that "the rights [under consideration] . . . are not created by Congress or the Constitution, except to the extent of certain limitations of power. 205 U.S. at 354-355, 27 S.Ct. at 527.

In my opinion, then, the delegation of legislative power to the Congress of Micronesia which created a qualified sovereignty in the Trust Territory as respects its own laws did not create any immunity from suits under an act of Congress such as NEPA. If there is immunity, it must be found elsewhere.

THE TRUSTEESHIP AGREEMENT DOES NOT VEST PLAINTIFFS WITH INDIVIDUAL LEGAL RIGHTS WHICH MAY BE ASSERTED IN THIS COURT

Plaintiffs allege that under the Trusteeship Agreement, particularly Article 6(2) which states that the administering authority shall "protect the inhabitants against the loss of their lands and resources," the United States undertook a "sacred trust"[31] which requires compliance with NEPA in all major actions affecting the environment. In support of their position, they cite Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D.D.C. decided November 9, 1972) and Davis v. Morton, 469 F.2d 593 (10th Cir. decided November 24, 1972) which held that exacting fiduciary standards governed the Secretary of the Interior's actions that affected respectively water and land rights of American Indian tribes.

While the analogy to American Indians may be apt in some respects, I do not believe that the principles of *Pyra-*

[31] Article 73 of the Charter of the United Nations states that:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the *interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost* . . . the well-being of the inhabitants of these territories. . . ." (Emphasis added).

mid Lake Paiute Tribe and *Davis* can be relied upon in this case. The "trust responsibility" of the United States as administering authority of the Trust Territory arises out of the Trusteeship Agreement. As discussed above, this document designates the islands as a "strategic" area and thus accords the United States unique and virtually unfettered rights of administration. Under these circumstances, it appears to be entirely inappropriate to apply the usual rules of interpretation for trust agreements and fiduciary obligations.

I conclude with Judge Keech in Pauling v. McElroy, 164 F.Supp. 390, 393 (D.D.C.1958) that:

> The provisions of the . . . Trusteeship Agreement for the Trust Territory of the Pacific Islands . . . are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.

Other Allegations

Finally, the pro forma allegations that the Complaint does not "contain a short and plain statement of the claim" as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure, and that plaintiffs have been guilty of laches, are without merit.

Therefore, based on my conclusion that neither the APA nor NEPA provide for judicial review of the actions complained of and that the Trusteeship Agreement does not vest plaintiffs with legal rights enforceable in this court, the Motions to Dismiss are granted.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1769

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICH R. MARCIANO, JOAQUIN P. VILLAGOMEZ, *Plaintiffs and Appellants,*

v.

UNITED STATES DEPARTMENT OF INTERIOR, ROGERS C. B. MORTON, Secretary of Interior, STANLEY S. CARPENTER, Deputy Assistant Secretary of the Interior for Territorial Affairs, EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands, all individually and in their official capacities.
Governmental Defendants and Appellees.
and
CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Corporate Defendant and Appellee.

[July 16, 1974]

Appeal from the United States District Court
for the District of Hawaii.

Before: TRASK and GOODWIN, Circuit Judges, and EAST,*
District Judge.

GOODWIN, Circuit Judge:

Plaintiffs, citizens of the Trust Territory of the Pacific Islands (known also as Micronesia), sued in the district court to challenge the execution by the High Commissioner of the Trust Territory of a lease permitting Continental

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Airlines to construct and operate a hotel on public land adjacent to Micro Beach, Saipan. Plaintiffs appeal a judgment of dismissal.

The district court held that the Trust Territory government is not a federal agency subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, or the National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321 et seq., and that the Trusteeship Agreement does not vest plaintiffs with individual legal rights which they can assert in a federal court. The court's opinion is published at 356 F.Supp. 645 (D. Hawaii 1973). We affirm the judgment, but, for the reasons set out below, we do so without prejudice to the right of the plaintiffs to refile in the district court should the High Court of the Trust Territory deny that it has jurisdiction to review the legality of the actions of the High Commissioner.

The facts are set out in detail in the district court opinion. In brief, Continental applied in 1970 to the Trust Territory government for permission to build a hotel on public land adjacent to Micro Beach, Saipan, an important historical, cultural, and recreational site for the people of the islands. Pursuant to the requirements of the Trust Territory Code, 67 T.T.C. § 53, Continental's application was submitted to the Mariana Islands District Land Advisory Board for its consideration. In spite of the Board's unanimous recommendation that the area be reserved for public park purposes, the District Administrator of the Marianas District recommended approval of a lease. The High Commissioner himself executed the lease on behalf of the Trust Territory government. An officer appointed by the President of the United States with the advice and consent of the Senate (48 U.S.C. § 1681a), the High Commissioner is the highest official in the executive branch of the Trust Territory government.

Following its execution in 1972, the lease was opposed by virtually every official body elected by the people of

Saipan. Indeed, the record in this case shows that the High Commissioner's decision was officially supported only by the United States Department of the Interior, the Trust Territory Attorney General (a United States citizen), and the District Administrator of the Marianas District (appointed by the High Commissioner, serving directly under him, and subject to removal by him).

Later in 1972, an action against some of the parties here was commenced before the High Court of the Trust Territory to enjoin construction of the hotel. The High Court, while denying defendants' motions to dismiss on certain nonfederal causes of action, held that NEPA did not apply to actions of the Trust Territory government, as plaintiffs had contended.[1] Soon afterward, the plaintiffs filed this action in the United States District Court for the District of Hawaii, and the High Court thereupon stayed proceedings before it pending the outcome of this action.

I. Judicial Review Under the APA or NEPA

The district court, relying upon its earlier decision in *People of Enewetak* v. *Laird*, 353 F.Supp. 811 (D. Hawaii 1973), again held that NEPA applies to federal agencies operating in the Trust Territory. It also held that approval of the lease agreement was "major" action, within the meaning of NEPA. However, although the district court rejected the defendants' contention that the Trust Territory government is a foreign government immune to suits

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[1] The High Court concluded that the Trust Territory government was not a "federal agency" and that the High Commissioner, acting as its chief executive officer, was not subject to NEPA. The court relied primarily upon the prior determination of the Secretary of the Interior that "territorial governments, under the jurisdiction of the Secretary of the Interior, are not agencies or instrumentalities of the executive branch of the Federal Government • • • [and] that the territorial governments are not organized entities of the Department of the Interior." Dept. Manual of Dept. of Interior 150.1.4.

in United States courts, it accepted the defendants' alternate contention that the local government is a government of a United States territory or possession, within the meaning of the exclusionary clause in the Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(C).[2] Having concluded that the Trust Territory government was exempt from review under the APA, the district court reasoned that the same standards on the scope of review should be applied to NEPA, and concluded that the action of the High Commissioner in approving and executing the lease agreement was not "federal" action covered by the National Environmental Policy Act, 42 U.S.C. § 4332.[3]

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[2] For the purpose of this chapter—

"(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

"* * *

"(C) the governments of the territories or possessions of the United States * * *." 5 U.S.C. § 701(b).

[3] "The Congress authorizes and directs that, to the fullest extent possible: * * * all agencies of the Federal Government shall—

"* * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented * * *." 42 U.S.C. § 4332.

We affirm these conclusions of the district court. *See* 356 F.Supp. at 649-61.[4]

We recognize, as did the district court, that several decisions have held governments of United States territories to be agencies of the federal government. However, these cases all involved a determination of agency for such purposes as income taxation, *Bell* v. *Commissioner,* 278 F.2d 100 (4th Cir. 1960), or the applicability of the Portal-to-Portal Act of 1947, *Kam Koon Wan* v. *E. E. Black, Ltd.,* 188 F.2d 558 (9th Cir.), *cert. denied,* 342 U.S. 826 (1951).[5] Plaintiffs have not cited and we have not found a case applying APA judicial review provisions to the Trust Territory or applying even similar review standards to the civil government of any territory or possession.

We also recognize, again as did the district court, that the APA exclusionary clause excludes only "the governments of the territories or possessions of the United States," 5 U.S.C. § 701(b)(1)(C), and that the Trust Territory is not a territory or possession, because technically the United States is a trustee rather than a sovereign. We agree with the district court that this distinction is immaterial, however, because the intent of Congress was to exclude from APA review all governments of this general type created pursuant to the authority of Congress.

Plaintiffs have cited several judicial decisions, a regulation, and one Tax Court decision stating that the Trust Territory is not a territory or possession of the United States. However, the holding of the judicial decisions is

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[4] *See also Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377 (1948), in support of the conclusion that NEPA applies to federal agencies operating in the Trust Territory.

[5] *But see Porter* v. *United States,* 496 F.2d 583 (Ct.Cl. May 15, 1974), holding that the Trust Territory government was not an agency of the United States for the purpose of asserting jurisdiction against the United States for an alleged breach of a contract negotiated by officials of the Trust Territory government.

limited to the applicability of the Federal Tort Claims Act (*see, e.g., Callas* v. *United States*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958); *Brunell* v. *United States*, 77 F.Supp. 68 (S.D.N.Y. 1948)), and the regulation and the Tax Court decision both involve federal income taxation. *See* Treas. Reg. § 1.931-1(a)(1); *Richard W. Benfer*, 45 T.C. 277 (1965). We do not read these decisions and the regulation to be inconsistent with our conclusion that Congress intended the government of the Trust Territory, like that of territories and possessions, to be immune from judicial review under the APA.

Finally, we note that the Trusteeship Agreement, in which the United Nations designated the United States to be the administering authority of the Trust Territory, states that the United States shall "promote the development of the inhabitants of the trust territory toward self-government * * *." Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6(1), 61 Stat. 3301, 3302, T.I.A.S. No. 1665. This clear statement of intent on the part of the United Nations to foster self-government in the Trust Territory constrains us not to hold that the actions of the local government are reviewable in the same manner as the actions of domestic federal administrative agencies, in a federal district court several thousand miles from the islands.

For these reasons and for those expressed in the opinion of the district court, we affirm the conclusion of that court that neither the Trust Territory government nor the High Commissioner alone is a "federal agency" as that term is used in making actions reviewable under the APA or NEPA.

II. Trusteeship Agreement

Plaintiffs also asserted below and assert here that the action of the governmental defendants in leasing public land to an American corporation against the expressed opposition of the elected representatives of the people of

Saipan and without compliance with NEPA is a violation of their duties under the Trusteeship Agreement. The district court rejected this argument, holding that the Trusteeship Agreement did not vest the citizens of the Trust Territory with rights which they can assert in a district court.

We cannot accept the full implications of this holding. We do not dispute the district court's conclusion that compliance with NEPA was not required by the Trusteeship Agreement.[6] We do, however, disagree with the holding insofar as it can be read to say that the Trusteeship Agreement does not create for the islanders substantive rights that are judicially enforceable.

The district court relied for its conclusion on language in *Pauling* v. *McElroy*, 164 F.Supp. 390, 393 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). *Pauling* concerned an attempt to enjoin United States officials from proceeding with nuclear tests in the Marshall Islands, an area within the trusteeship. The controversy there, unlike the one here, involved the Trusteeship Agreement's grant of broad discretion to use the area for military purposes. *See* Trusteeship Agreement arts. 1, 5, 13, 61 Stat. 3301, 3302, 3304. We do not find *Pauling* to support the defendants' contention here that the plaintiffs cannot invoke the provisions of the Trusteeship Agreement to challenge the High Commissioner's power to lease local public land for commercial exploitation by private developers.

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[6] Article 12 of the Trusteeship Agreement empowers the United States "to enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory." Our conclusion that the actions of the Trust Territory government are not subject to NEPA is an equivalent way of saying that Congress has not, pursuant to Article 12, legislated to make NEPA applicable to the Trust Territory government. Hence, in approving the lease agreement, the High Commissioner was under no obligation to comply with NEPA. This is the same conclusion as that reached by the High Court. *See* note 1, *supra*.

The right of Rhodesian and American citizens to maintain an action in the courts of the United States seeking enforcement of the United Nations embargo against Rhodesia was recently recognized in *Diggs* v. *Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). On the merits, the court denied specific relief because of Congressional action which was held to have abrogated the United Nations Security Council Resolution, but the right to seek enforcement in federal court was firmly established. That decision, if correct, suggests that the islanders here can enforce their treaty rights, if need be in federal court.[7]

Article 73 of the United Nations Charter, 59 Stat. 1031, 1048, T.S. No. 993 (1945), which discusses non-self-governing territories generally, provides:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> "a. To ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protections against abuses * * *."

See also United Nations Charter art. 76, describing the basic objectives of the trusteeship system. Although the plaintiffs have argued that these articles of the United Nations Charter, standing alone, create affirmative and

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[7] *See* Note, 14 Va. J. Int'l L. 185 (1973), which comments upon *Diggs* v. *Schultz*.

judicially enforceable obligations, we assume without deciding that they do not.

However, pursuant to Article 79 of the Charter,[8] the general principles governing the administration of trust territories were covered in more detail in a specific trusteeship agreement for the Trust Territory of the Pacific Islands. *See generally* L. Goodrich, E. Hambro & A. Simons, *Charter of the United Nations: Commentary & Documents* 502 (3rd ed. 1969). Specifically, Article 6 of the Trusteeship Agreement requires the United States to "promote the economic advancement and self-sufficiency of the inhabitants, and to this end * * * regulate the use of natural resources" and to "protect the inhabitants against the loss of their lands and resources * * *."

Defendants contend, though, that provisions of the Trusteeship Agreement, including Article 6, can be enforced only before the Security Council of the United Nations.[9] We disagree, concluding that the Trusteeship Agreement can be a source of rights enforceable by an individual litigant in a domestic court of law.

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[8] The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85." *United Nations Charter* art. 79, 59 Stat. 1031, 1049.

[9] Unlike the other ten trusteeships set up after World War II, pursuant to agreements between the United Nations and various nations, the Trust Territory was designated as a "strategic" trust. Trusteeship Agreement art. 1, 61 Stat. 3301. *See* 1 M. Whiteman, *Digest of International Law* 766. This designation results in the United States being responsible to the Security Council for the administration of the Trust Territory—where the United States possesses veto power (*United Nations Charter* art. 27, 59 Stat. 1041)—rather than to the General Assembly. *United Nations Charter* art. 83(1), 59 Stat. 1050.

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution. *See generally* M. McDougal, H. Lasswell, & J. Miller, *The Interpretation of Agreements and World Public Order; Principles of Content and Procedure passim* (1967).

The preponderance of features in this Trusteeship Agreement suggests the intention to establish direct, affirmative, and judicially enforceable rights. The issue involves the local economy and environment, not security; the concern with natural resources and the concern with political development are explicit in the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic fora; and the alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable.

Moreover, the Trusteeship Agreement constitutes the plaintiffs' basic constitutional document (*see* Parry, *The Legal Nature of Trusteeship Agreements*, 27 Brit. Year Book Int'l L. 164, 182-84 (1950), *excerpted* in 1 M. Whiteman, *Digest of International Law* 893 (1963), and is codified into the law of the Trust Territory. 1 T.T.C. § 101(1). For all these reasons, we believe that the rights asserted by the plaintiffs are judicially enforceable. However, we see no reason why they could not and should not have been enforced in the High Court of the Trust Territory. The district court found that:

> "* * * The lease approval was a 'local' decision of the High Commissioner acting within the scope of his duties as chief executive of the Trust Territory gov-

> ernment. The officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form * * *." 356 F. Supp. at 657 n.28.

Surely, the judicial branch of the Trust Territory government has the authority to determine whether or not the action of its chief executive complies with a provision in its own constitutional document.

We recognize that the Trusteeship Agreement purports to obligate the United States, not the individual who happens to be High Commissioner. Nonetheless, because of the process of his appointment,[10] the High Commissioner

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[10] Article 12 of the Trusteeship Agreement of 1947 authorized the United States to enact such legislation as may be necessary to implement the agreement. 61 Stat. 3304. At first, President Truman gave the Navy administrative responsibility for the islands. Exec. Order No. 9875, 12 Fed. Reg. 4837 (1947), 3 C.F.R. 658 (1943-48 Comp.). In 1951 administration of the islands was transferred to the Department of the Interior. Exec. Order No. 10265, 16 Fed. Reg. 6419 (1951), 3 C.F.R. 766 (1943-53 Comp.). During the next two years, responsibility for administration of parts of the Trust Territory was redelegated back to the Secretary of the Navy. Exec. Order No. 10408, 17 Fed. Reg. 10277 (1952), 3 C.F.R. 906 (1949-53 Comp.); Exec. Order No. 10470, 18 Fed. Reg. 4231 (1953), 3 C.F.R. 951 (1949-53 Comp.). Not until 1954 did Congress begin to legislate to implement the Trusteeship Agreement, and then it merely stated that, until it provided further for its government, all governmental authority in the Trust Territory rested with the President. Act of June 30, 1954, ch. 423, § 1, 68 Stat. 330, *as amended*, 48 U.S.C. § 1681(a). Finally, in 1962 President Kennedy redelegated his authority for civil administration of the entire Trust Territory to the Secretary of the Interior. Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962), 3 C.F.R. 600 (1959-63 Comp.). The Secretary of the Interior, in turn, delegated executive authority for the Trust Territory to the High Commissioner:

> "The executive authority of the Government of the Trust Territory, and the responsibility for carrying out the international obligations undertaken by the United Nations with re-

has the responsibility to act in a manner consistent with the duties assumed by the United States itself in the Trusteeship Agreement.

Thus, although we hold that the Trusteeship Agreement is a source of individual legal rights, we also hold that, in a case involving actions by the High Commissioner within the scope of his duties as chief executive, these rights are not initially enforceable in United States courts. Rather, upon principles of comity, they should be asserted before the High Court of the Trust Territory.

Admittedly, the substantive rights guaranteed through the Trusteeship Agreement are not precisely defined. However, we do not believe that the agreement is too vague for judicial enforcement. Its language is no more general than such terms as "due process of law," "seaworthiness," "equal protection of the law," "good faith," or "restraint of trade," which courts interpret every day. Moreover, the High Court can look for guidance to its own recently

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spect to the Trust Territory, shall be vested in a High Commissioner of the Trust Territory and shall be exercised and discharged under the supervision and direction of the Secretary." Dept. of Interior Order No. 2918, pt. II, § 1, 34 Fed. Reg. 157 (1969).

Meanwhile, the 1967 Congress provided that this High Commissioner shall be appointed by the President and confirmed by the Senate. Act of May 10, 1967, Pub. L. No. 90-16 § 2, 81 Stat. 15, *codified*, 48 U.S.C. § 1681a. *See generally* Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139 (1972).

Thus, as the district court here observed, the High Commissioner's authority "does not come from the people of the Trust Territory, nor do they have any method of removing him when dissatisfied with his actions or policies." 356 F. Supp. at 655. *See also Societa A.B.C.* v. *Fontana & Della Rocca*, [1955] I.L.R. 76 (Court of Cassation, United Chambers, Italy 1954), quoted at 1 M. Whiteman, *Digest of International Law* 870-71, which held that the Italian Trusteeship Administrator for Somaliland derived his authority from the Italian state and, hence, was an organ of that state.

enacted environmental quality and protection act, T. T. Pub. L. No. 4C-78 of Apr. 14, 1972, *codified* at 63 T.T.C. §§ 501-509, to the relevant principles of international law and resource use which have achieved a substantial degree of codification and consensus (*see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964)), and to the general direction, although not necessarily the specific provisions, of NEPA. *Cf. Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972). These sources should provide a sufficiently definite standard against which to test the High Commissioner's approval of a 50-year lease of unique public lands to an American corporation, allegedly in disregard of the protests of the islands' elected officials and without a showing of consideration of cultural and environmental factors.

Since the High Commissioner claims to have been acting pursuant to local statutes when he approved the lease to Continental, if the High Court finds that his action violated provisions of the Trusteeship Agreement, that court may have to declare these statutes void either on their face or void as applied by the High Commissioner. The order of the United States Department of the Interior which established the structure of the Trust Territory government forbids the legislative branch of the Trust Territory government from enacting any legislation inconsistent with "treaties or international agreements of the United States • • •." Dept. of Interior Order No. 2918, pt. III, § 2(a) (1968). Because the Trusteeship Agreement is an international agreement of the United States, local legislation inconsistent with it must fall.

Although the High Court has held that it lacks jurisdiction over an agency of the United States or its officers in the Trust Territory (*see Schulz* v. *Peace Corps*, 4 T.T.R. 428 (1969)), the Secretary of the Interior assures us that his department did not participate in any way in the decision to grant a lease to Continental, and, hence, that *Schulz* will not bar the High Court from hearing and deciding this

case. If, in the proceedings before the High Court, it should appear that the actions of the High Commissioner cannot be effectively reviewed and tested against the duties assumed by the United States in the Trusteeship Agreement, either because his actions were controlled by a directive or regulation of the Secretary of the Interior which the High Court considers nonreviewable or because the High Court does not agree that it has the power to review the High Commissioner's actions against the standards established in the Trusteeship Agreement, then the plaintiffs may refile this action in the United States District Court for the District of Hawaii.

We recognize that the High Court has said earlier that the Trusteeship Agreement does not create a trust capable of enforcement through the courts. *See Alig* v. *Trust Territory of the Pacific Islands*, 3 T.T.R. 603, 615-16 (1967). We also recognize that, unless the High Commissioner acted unconstitutionally or in violation of the law, the suit against him might not be cognizable in the Trial Division of the High Court because of the doctrine of sovereign immunity. *See also* 6 T.T.C. § 252(2). Nonetheless, the High Court is free to re-evaluate its position with regard to the enforceability of the provisions of the Trusteeship Agreement under *Diggs* v. *Schultz, supra.*[11] It may con-

[11] "Appellees suggest that the prospects of significant relief by means of the embargo are so slight that this relationship of intended benefit is too tenuous to support standing. But this strikes us as tantamount to saying that because the performance of the United Nations is not always equal to its promise, the commitments of a member may be disregarded without having to respond in court to a charge of treaty violation. It may be that the particular economic sanctions invoked against Southern Rhodesia in this instance will fall far short of their goal, and that appellants will ultimately reap no benefits from them. But, to persons situated as are appellants, the United Nations action constitutes the only hope; and they are personally aggrieved and injured by the dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful." *Diggs* v. *Schultz*, 470 F.2d at 465.

clude, as we did, that as the judicial branch of a political entity possessing many of the attributes of an independent nation, that court has the power to hear a claim that the islands' chief executive officer has violated terms of the Trusteeship Agreement. If the High Court reaches this conclusion, the doctrine of sovereign immunity would provide no basis for refusing to hear the action. *See Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 701-02 (1949).

We hold, then, that the plaintiffs must initially pursue their remedies in the local court. If our assumption that the High Court has the power to review the decision of the High Commissioner proves to be invalid, then the federal district court must assume jurisdiction of this case. We refuse to leave the plaintiffs without a forum which can hear their claim that the High Commissioner has violated the duties assumed by the United States in the Trusteeship Agreement.

Because it is possible that we may see this case again, we comment briefly on one issue raised by the defendants. Continental contends that it has acquired some equities by proceeding with the construction of its hotel while its right to do so is being litigated. Unless we misread the argument, Continental seems to be asserting that the damage has been done, and that it is too late for courts to remedy it. We note that Continental initiated bulldozing activities at the Micro Beach without notice and while the High Commissioner supposedly was giving further consideration to the project. The plaintiffs' action was commenced in the High Court almost immediately afterward, and in federal court within one and one-half months. We caution Continental that:

> "* * * [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he

> acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided * * *." *Jones* v. *S.E.C.*, 298 U.S. 1, 17 (1936), *quoted in Nat'l Forest Preservation Group* v. *Butz*, 485 F.2d 408, 411 (9th Cir. 1973).

The judgment of dismissal is affirmed as modified.

TRASK, Circuit Judge, Concurring:

I join in the decision of the majority but follow a different course to the common conclusion.

First of all, it appears clear to me that the Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants. Although under Article VI of the Constitution[1] treaties are part of the supreme law of the land, it was early held that to be immediately binding upon our courts a treaty must be self-executing. Chief Justice Marshall enunciated this principle in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829):[2]

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature,

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[1] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI.

[2] The decision in *Foster* was overruled by United States v. Percheman, 32 U.S. (7 Pet.) 51 (1883), in an opinion also written by Chief Justice Marshall when new facts were brought to bear upon the controversy, but the legal principle announced in *Foster* was not undermined. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10 (1936); Head Money Cases, 112 U.S. 580, 598-99 (1884); L. Henkin, Foreign Affairs and the Constitution 156-58 (1972); Comment, *Criteria for Self-Executing Treaties*, 1968 U. Ill. L.F. 238, 239.

> whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Unless a treaty is self-executing, in order to be cognizable before the courts it must be implemented by legislation. Otherwise it constitutes a compact between sovereign and independent nations dependent for its recognition and enforcement upon the honor and the continuing self-interest of the parties to it. If, however, the treaty contains language which confers rights or obligations on the citizenry of the compacting nations then, upon ratification, it becomes a part of the law of the land under Article VI. In *Head Money Cases,* 112 U.S. 580 (1884), the Court said:

> "A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." 112 U.S. at 598-99.

I find nothing in a reading of the Charter and nothing has been called to my attention which would persuade me to believe that the Charter itself creates individual rights which may be enforced in the courts.[3] There is little definitive case law elucidating the issue of self-implementation

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[3] The fact that a treaty was ratified by the President of the United States upon the advice and consent of two-thirds of the Senate, as was the United Nations Charter (Charter of the United Nations, June 26, 1945, 59 Stat. 1031, 1213, T.S. No. 993 (effective Oct. 24, 1945)), makes it a commitment of the nation but does not necessarily impart rights and obligations to individual citizens.

vel non. The appellants have referred to some of the cases in which reference to the Charter has been made.[4]

Those cases are of questionable precedential value. Looking in the opposite direction we find cases that are subject to much the same criticism. The only case which straightforwardly holds in broad terms that the Charter is not self-executing is *Pauling* v. *McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd per curiam on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). The District Court in *Pauling* stated:

"The provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Terri-

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[4] In concurring opinions in Oyama v. California, 332 U.S. 633, 649-50, 673 (1948), Justices Black, Douglas, and Murphy intimate that Articles 55 and 56 of the Charter support a position proscribing racial discrimination; a dissenting opinion in Hard v. Hodge, 162 F.2d 233, 245 (D.C. Cir. 1947), *rev'd* 334 U.S. 24 (1948), is much the same. In an appeal from a contempt-of-Congress conviction for the refusal of a United Nations' employee to answer whether anyone had aided her in obtaining employment, Article 105 was discussed but the actual decision was based upon other grounds. Keeney v. United States, 218 F.2d 843, 845 (D.C. Cir. 1954). Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), was a case in which the plaintiffs sought relief against the Secretary of the Treasury because of an official authorization of importation of metals contrary to the terms of a United Nations' embargo in which the United States had joined. Relief was denied because of the nonjusticiability of the claim under the separation-of-powers doctrine, although the court did hold that the plaintiffs had standing to litigate the issue of the failure of the defendants to adhere to the Government's treaty obligations. In *Diggs*, however, the relevant provision of the Charter, Article 41, had been implemented by Congress through the enactment of 22 U.S.C. § 287c, which authorizes the President to effectuate Article 41 sanctions and prescribes criminal penalties for those individuals disobeying such Presidential orders. Indeed, pursuant to this statutory authority, the President had issued Executive orders banning the importation of the items in question. Exec. Order No. 11,419, 3 C.F.R. 737 (1966-70 Comp.), 22 U.S.C. § 287c; see Exec. Order No. 11,322, 3 C.F.R. 606 (1966-70 Comp.), 22 U.S.C. § 287c; *see Diggs* v. *Schultz*, 470 F.2d at 463.

tory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. *The claimed violations of such international* obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned." 164 F. Supp. at 393.

In *Hitai* v. *Immigration & Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), the court held that Article 55 of the Charter was not self-executing. Both from the standpoint of the inherent nature of treaty obligations and what appears to me to be a plain reading of the language of the Charter, I would hold it to be a compact between sovereign nations neither intending to impart justiciable rights to individuals nor implicitly doing so.

This position is fortified, it would seem, by the very fact that the Charter provided for a system of trusteeship. Chapter XI, which contains Article 73, is a mutual declaration of the members of their responsibilities for the administration of territories whose peoples have not yet attained a complete competence of self-government. Chapter XII and Chapter XIII then provide for the International Trusteeship System for the administration and supervision of those territories. Under those Articles a Trusteeship Agreement was executed between the Security Council of the United Nations and the United States, as administering authority effective July 18, 1947, for the Territory of the Pacific Islands.[5] It provided the United States with the

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[5] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665. The Agreement was approved by the President on July 18, 1947, pursuant to the authority of a joint resolution of Congress of the same date. 61 Stat. 397 (1947).

authority to enact a comprehensive system of government under Article 6.[6]

Congress has empowered the President with authority for the civil administration of the Territory until Congress itself should further establish a system of government. 48 U.S.C. § 1681. Under this statutory basis, a series of Executive orders delegated responsibility for government to the Department of the Interior, *see* Exec. Order No. 11,021, 3 C.F.R. 600 (1959-63 Comp.), 48 U.S.C. § 1681, and that Department eventually promulgated a single document combining previous orders into one basic order for the Government of the Trust Territory of the Pacific Islands. Dept. of Interior Order No. 2918, Dec. 27, 1968, 34 Fed. Reg. 157 (1969). This consolidated order constituted a mini-organic act creating legislative, executive, and judicial branches of the Government with a Congress, a High Commissioner as the Chief executive, and a High Court of the Trust Territory with a Chief Justice and Associate Justices appointed by the Secretary of the Interior.

I agree with the federal appellees and with the court in *Pauling* v. *McElroy, supra*, that the Trusteeship Agreement is not self-executing.[7] Yet, a series of actions all ultimately

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[6] Trusteeship Agreement, art. 12. Article 6 provides in pertinent part that the administering authority [the United States] shall:

> "1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence . . .;
>
> "2. promote the economic advancement and self-sufficiency of the inhabitants . . .;
>
> "3. promote the social advancement of the inhabitants . . .; and
>
> "4. promote the educational advancement of the inhabitants . . . ." 61 Stat. at 3302-03.

[7] The language of the Agreement, and in particular that of Article 6, the specific provision at issue in this suit, evinces a series of general commitments undertaken by the United States in furtherance of particular social objectives. *See* note 6 *supra*. That these phrases may become workable through judicial construction,

founded upon congressional authority have so executed the Agreement that its provisions may now properly be regarded as judicially enforceable. Thus, the Agreement was approved by the President pursuant to a joint resolution of Congress, *see* note 5 *supra*, and implemented by Executive orders promulgated pursuant to congressional authority, 48 U.S.C. § 1681. Finally, the Trust Territory Government, created by the Department of the Interior, has declared the Agreement "to be in full force and to have the effect of law in the Trust Territory." 1 T.T.C. § 101(1).

The Trust Territory Code provides:

> "The Trial Division of the High Court shall have original jurisdiction to try all causes, civil and criminal, including probate, admiralty, and maritime matters and the adjudication of title to land or any interest therein." 5 T.T.C. § 53.

All decisions rendered in such matters are subject to review by the Appellate Division under 55 T.T.C. § 54(1)(a). It thus appears to me as it does to the majority that jurisdiction does lie with the High Court to determine the validity of the lease in accordance with its own law and any other law affecting the lease or the lands to which the lease is applicable. Based upon considerations of comity, I agree that this cause should initially be addressed to the High Court.

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as the majority opines, does not detract from the probability that, had the drafters of the instrument intended the document to have the effect of a statute, more precise language delimiting the rights of Micronesians would have been employed. *Compare* Head Money Cases, 12 U.S. 580, 598-99 (1884); Hauenstein v. Lynham, 100 U.S. 483 (1879). Moreover, the Agreement, in Article 12, states:

> "The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory."

Since, under the Constitution of the "adminstering authority" (the United States), self-executing treaties are effective upon ratification, this provision, as drafted, would not have been necessary had the drafters intended the Agreement to be self-executing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1769

THE PEOPLE OF SAIPAN, etc., et al., *Appellants,*

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,
Governmental Appellees,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Corporate Appellee.

Order

Appeal from the United States District Court
for the District of Hawaii.

Before: TRASK and GOODWIN, Circuit Judges, and EAST,* District Judge.

Appellants' petition for rehearing, filed August 16, 1974, is hereby

DENIED.

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

NATIONAL ENVIRONMENTAL POLICY ACT

(42 U.S.C. §§ 4321-4335; subchapter II omitted)

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

SUBCHAPTER I.—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public

laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

APPENDIX D

TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS

(61 Stat. 3301)

PREAMBLE

WHEREAS Article 75 of the Charter of the United Nations provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent agreement; and

WHEREAS under Article 77 of the said Charter the trusteeship system may be applied to territories now held under mandate; and

WHEREAS on 17 December 1920 the Council of the League of Nations confirmed a mandate for the former German Islands north of the equator to Japan, to be administered in accordance with Article 22 of the Covenant of the League of Nations; and

WHEREAS Japan, as a result of the Second World War, has ceased to exercise any authority in these islands;

NOW THEREFORE, the Security Council of the United Nations, having satisfied itself that the relevant articles of the Charter have been complied with, hereby resolves to approve the following terms of trusteeship for the Pacific Islands formerly under mandate to Japan.

ARTICLE 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the

Pacific Islands is hereinafter referred to as the trust territory.

ARTICLE 2

The United States of America is designated as the administering authority of the trust territory.

ARTICLE 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable such of the laws of the United States as it may deem appropriate to local conditions and requirements.

ARTICLE 4

The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as specified in Article 83(2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

ARTICLE 5

In discharging its obligations under Article 76(a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;

2. to station and employ armed forces in the territory; and

3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

ARTICLE 6

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:

1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

2. promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

3. promote the social advancement of the inhabitants and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control

the traffic in arms and ammunition, opium and other dangerous drugs, and alcoholic and other spiritous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

4. promote the educational advancement of the inhabitants, and to this end shall take steps toward the establishment of a general system of elementary education; facilitate the vocational and cultural advancement of the population; and shall encourage qualified students to pursue higher education, including training on the professional level.

ARTICLE 7

In discharging its obligations under Article 76(c), of the Charter, the administering authority shall guarantee to the inhabitants of the trust territory freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.

ARTICLE 8

1. In discharging its obligations under Article 76(d) of the Charter, as defined by Article 83(2) of the Charter, the administering authority, subject to the requirements of security, and the obligation to promote the advancement of the inhabitants, shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation except the administering authority.

2. The administering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice.

3. Nothing in this Article shall be so contrued as to accord traffic rights to aircraft flying into and out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

4. The administering authority may negotiate and conclude commercial and other treaties and agreements with Members of the United Nations and other states, designed to attain for the inhabitants of the trust territory treatment by the Members of the United Nations and other states no less favourable than that granted by them to the nationals of other states. The Security Council may recommend, or invite other organs of the United Nations to consider and recommend what rights the inhabitants of the trust territory should acquire in consideration of the rights obtained by Members of the United Nations in the trust territory.

ARTICLE 9

The administering authority shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.

ARTICLE 10

The administering authority, acting under the provisions of Article 3 of this agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of states, may cooperate with specialized international bodies, public or private, and may engage in other forms of international cooperation.

ARTICLE 11

1. The administering authority shall take the necesssary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory.

2. The administering authority shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority.

ARTICLE 12

The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

ARTICLE 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

ARTICLE 14

The administering authority undertakes to apply in the trust territory the provisions of any international conventions and recommendations which may be appropriate to the particular circumstances of the trust territory and which would be conducive to the achievement of the basic objectives of Article 6 of this agreement.

ARTICLE 15

The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

ARTICLE 16

The present agreement shall come into force when approved by the Security Council of the United Nations and by the Government of the United States after due constitutional process.

42 U.S.C. § 1681(a)

Until Congress shall further provide for the government of the Trust Territory of the Pacific Islands, all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize.

EXECUTIVE ORDER NO. 11021

(3 C.F.R. 1959-63 Comp. at 600)

WHEREAS the Trust Territory of the Pacific Islands was placed under the trusteeship system established in the Charter of the United Nations by means of a trusteeship agreement approved by the Security Council of the United Nations on April 2, 1947, and by the United States Government on July 18, 1947, after due constitutional process (hereinafter referred to as the trusteeship agreement); and

WHEREAS the United States of America was designated under the terms of the trusteeship agreement as the administering authority of the Trust Territory referred to above (hereinafter referred to as the trust territory); and

WHEREAS the United States has heretofore assumed obligations for the civil administration of the trust territory and has carried out such civil administration

under the provisions of Executive Orders Nos. 9875 of July 18, 1947, 10265 of June 29, 1951, 10408 of November 10, 1952, and 10470 of July 17, 1953; and

WHEREAS thereunder the Secretary of the Navy is now responsible for the civil administration of the Northern Mariana Islands except the Island of Rota and the Secretary of the Interior is responsible for the civil administration of all of the remainder of the trust territory; and

WHEREAS it appears that the purposes of the trusteeship agreement can best be effectuated at this time by placing in the Secretary of the Interior responsibility for the civil administration of all of the trust territory:

NOW, THEREFORE, by virtue of the authority vested in me by the Act of June 30, 1954 (68 Stat. 330: 48 U.S.C. 1681) and as President of the United States, it is ordered as follows:

Section 1. Responsibility of Secretary of the Interior. The responsibility for the administration of civil government in all of the trust territory, and all executive, legislative, and judicial authority necessary for that administration, are hereby vested in the Secretary of the Interior. Subject to such policies as the President may from time to time prescribe, and in harmony with applicable law, and, where advantageous, in collaboration with other departments and agencies of the Government, the Secretary of the Interior shall take such actions as may be necessary and appropriate to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement and under the Charter of the United Nations: *Provided however,* That the authority to specify parts or all of the trust territory as closed for security reasons and to determine the extent to which Articles 87 and 88 of the Charter of the United Nations shall be applicable to such closed areas, in accordance with Article 13 of the trustee-

ship agreement, shall be exercised by the President: *And provided further,* That the Secretary of the Interior shall keep the Secretary of State currently informed of activities in the trust territory affecting the foreign policy of the United States and shall consult with the Secretary of State on questions of policy concerning the trust territory which relate to the foreign policy of the United States, and that all relations between the departments and agencies of the Government and appropriate organs of the United Nations with respect to the trust territory shall be conducted through the Secretary of State.

Section 2. Redelegation of authority. The executive, legislative, and judicial authority provided for in section 1 of this order may be exercised through such officers or employees of the Department of the Interior, or through such other persons under the jurisdiction of the Secretary of the Interior, as the Secretary may designate, and shall be exercised in such manner as the Secretary, or any person or persons acting under the authority of the Secretary, may direct or authorize.

Section 3. Cooperation with Department of the Interior. The executive departments and agencies of the Government shall cooperate with the Department of the Interior in the effectuation of the provisions of this order.

Section 4. Prior Orders. To the extent not heretofore superseded or otherwise rendered inapplicable, the following are hereby superseded:

(1) Executive Order No. 10265 of June 29, 1951.

(2) Executive Order No. 10408 of November 10, 1952.

(3) Executive Order No. 10470 of July 17, 1953.

Section 5. Saving provisions. (a) Existing laws, regulations, orders, appointments, or other acts promulgated, made, or taken by the Secretary of the Interior or his delegates under the authority of Executive Order No.

10265, as amended and in effect immediately prior to the effective date of this order, shall remain in effect until they are superseded in pursuance of the provisions of this order.

(b) Nothing contained in this order shall be construed as modifying the rights or obligation of the United States under the provisions of the trusteeship agreement or as affecting or modifying the responsibility of the Secretary of State to interpret the rights and obligations of the United States arising out of that agreement.

Section 6. Effective date. The provisions of this order shall become effective on July 1, 1962.

/s/ JOHN F. KENNEDY

The White House
May 7, 1962.

DEPARTMENT OF THE INTERIOR ORDER NO. 2918

WHEREAS, pursuant to the Trusteeship Agreement between the United States and the Security Council of the United Nations, the United States has undertaken to promote self-government in the Trust Territory of the Pacific Islands; and

WHEREAS, Department of the Interior Order No. 2876 of January 30, 1964, as amended, set forth the extent and nature of the authority of the Government of the Trust Territory of the Pacific Islands; and

WHEREAS, Department of the Interior Order No. 2882 of September 28, 1964, as amended, created the Congress of Micronesia and granted legislative authority thereto; and

WHEREAS, it is appropriate that the two aforesaid basic Orders, as amended, be modified in minor particulars, consolidated in one basic order, and reissued, with all amendments therein incorporated,

NOW THEREFORE, the following single basic Order respecting the Government of the Trust Territory of the Pacific Islands is issued:

PART I. PURPOSE

The purpose of this Order is to delimit the extent and nature of the authority of the Government of the Trust Territory of the Pacific Islands (hereinafter called "the Trust Territory"), as it will be exercised under the jurisdiction of the Secretary of the Interior (hereinafter called "the Secretary"), pursuant to Executive Order No. 11021 of May 7, 1962, and to prescribe the manner in which the relationships of the Government of the Trust Territory shall be established and maintained with the Congress, the Department of the Interior and other Federal agencies, and with foreign governments and international bodies.

Part II. EXECUTIVE AUTHORITY

Section 1. The executive authority of the Government of the Trust Territory, and the responsibility for carrying out the international obligations undertaken by the United Nations with respect to the Trust Territory, shall be vested in a High Commissioner of the Trust Territory and shall be exercised and discharged under the supervision and direction of the Secretary.

The Secretary shall appoint a Deputy High Commissioner, who shall have all the powers of the High Commissioner in the case of a vacancy in the office of High Commissioner or the disability or temporary absence of the High Commissioner.

Section 2. The relations of the Government of the Trust Territory with the Congress of the United States on all legislative matters, including appropriations, shall be conducted through the Department of the Interior.

Section 3. With freedom to consult directly with the Secretary when necessary, the High Commissioner of the

Trust Territory shall normally communicate with the Secretary of the Interior through the Director of the Office of Territories. The High Commissioner shall be responsible for all United States property in the Trust Territory which is required for the operation of the Government of the Trust Territory and for which the Department of the Interior has administrative responsibility. The High Commissioner shall perform such other functions for the Department of the Interior in the Trust Territory as may be delegated to him by the Secretary.

Section 4. Initial contact by the Government of the Trust Territory with Federal agencies outside the Department of the Interior on other than routine matters shall be established through the Office of Territories of the Department of the Interior. Once the relationship has been established, direct contact between the Government of the Trust Territory and the Federal agencies concerned may be maintained, in which event the Office of Territories shall be kept informed of significant developments in the relationship.

Section 5. Communications of the Government of the Trust Territory with foreign governments and international bodies shall be cleared through the Department of the Interior for transmittal by the Department of State, unless some other procedure is approved by the Secretary of the Interior.

Section 6. In exercising his authority the High Commissioner shall obtain prior Secretarial approval of any significant deviation from the budget justification presented to the Congress, and any significant transfer of funds between programs or between administration and construction funds.

PART III. LEGISLATIVE AUTHORITY

Section 1. *Organization.* The Legislature of the Trust Territory of the Pacific Islands shall be known as the

"Congress of Micronesia" and shall consist of two Houses, the Senate and the House of Representatives. The two Houses shall sit separately except as otherwise provided herein.

When the Congress shall convene, each House shall organize by the election of one of its number as presiding officer and such presiding officer shall be designated by the title of "President of the Senate" or "Speaker of the House of Representatives," as the case may be. When the Congress meets in joint session, the Speaker of the House of Representatives shall preside.

Section 2. *Legislative Power.* The legislative power of the Congress of Micronesia shall extend to all rightful subjects of legislation, except that no legislation may be inconsistent with

(a) treaties or international agreements of the United States;

(b) laws of the United States applicable to the Trust Territory;

(c) Executive Orders of the President of the United States and orders of the Secretary of the Interior; or

(d) Sections 1 through 12 of the Code of the Trust Territory.

No law shall be passed by the Congress imposing any tax upon property of the United States or property of the Trust Territory of the Pacific Islands; nor shall the property of nonresidents be taxed at a higher rate than the property of residents. No import or export levies shall be imposed on goods transported between or among the Districts of the Trust Territory, as described in Section 39 of the Code of the Trust Territory, or any political subdivision thereof, and the levy of duties on goods imported

into the Trust Territory is hereby reserved to the Congress of Micronesia and the High Commissioner.

Section 3. *Powers of the High Commissioner.* At the opening of a legislative session and at any time thereafter the High Commissioner may submit to the Congress and recommend the enactment of legislation.

Section 4. *Budget.* Money bills enacted by the Congress of Micronesia shall not provide for the appropriation of funds in excess of such amounts as are available from revenues raised pursuant to the tax laws and other revenue laws of the Trust Territory: *Provided,* That the Secretary of the Interior shall, from time to time, define the term 'revenue' as used herein, so as generally to exclude therefrom all sums attributable to user charges or service related reimbursements to the Government of the Trust Territory. Prior to his final submission to the Secretary of the Interior of requests for Federal funds necessary for the support of governmental functions in the Trust Territory, the High Commissioner shall prepare a preliminary budget plan. He shall submit such plan to the Congress of Micronesia in joint session for its review and recommendations with respect to such portions as relate to expenditures of funds proposed to be appropriated by the Congress of the United States. With respect to such portions of the preliminary budget plan, the High Commissioner shall adopt such recommendations of the Congress as he may deem appropriate, but he shall transmit to the Secretary of the Interior all recommendations he has not adopted.

Section 5. *Membership.* For the purpose of representation in the Congress, the Trust Territory is divided into six districts as described in Section 39 of the Code of the Trust Territory.

The Senate shall consist of twelve members, who shall be known as "Senators," of which each District shall elect two.

The House of Representatives shall consist of twenty-one members, who shall be known as "Representatives," and who shall be elected from each District as follows:

In the Mariana Islands District, three;

In the Marshall Islands District, four;

In the Palau District, three;

In the Ponape District, four;

In the Truk District, five;

In the Yap District, two.

Each of the six Administrative Districts shall be subdivided initially into single member election districts of approximately equal population, in such manner as the High Commissioner shall determine, and each such election district shall elect one of the Representatives to which the Administrative District is entitled. Future subdivisions shall be established by law.

Election districts shall be reapportioned every 10 years on the basis of population, but each District (as described in Section 39 of the Trust Territory Code), shall be entitled to at least two representatives. The first such reapportionment shall be made in 1971.

Section 6. Qualification of Legislators. In order to be eligible to election as a member of the Congress a person shall:

(a) be a citizen of the Trust Territory for at least five years;

(b) have attained the age of twenty-five years at the time of his election; and

(c) have been a bona fide resident of the District (as described in Section 39 of the Code of the Trust Territory), from which he is elected for at least one year next preceding his election.

No person who has been expelled from the Congress for giving or receiving a bribe or for being an accessory thereto, and no person who has been convicted of a felony by any court of the Trust Territory, a court of one of the States of the United States, or any court with the jurisdiction of a district court of the United States, shall sit in the Congress unless the person so convicted has received a pardon restoring his civil rights.

Section 7. Franchise. The franchise shall be vested in residents of the Trust Territory who are citizens of the Trust Territory and eighteen years of age or over. Additional qualifications may be prescribed by the Congress: *Provided*, That no property, language, or income qualification shall ever be imposed or required of any voter, nor shall any discrimination in qualification be made or based upon literacy, tribal custom, or social position, nor upon difference in race, color, ancestry, sex or religious belief.

Section 8. General Elections. General elections shall be held biennially in each even-numbered year on the first Tuesday following the first Monday in November: *Provided*, That in the event of a natural disaster or other Act of God, the effect of which precludes holding the election on the foregoing date, the High Commissioner, with the approval of the Secretary of the Interior, may proclaim a later election date in the affected election district or districts. All elections shall be held in accordance with such procedures as this order and the laws of the Trust Territory may prescribe. Legislators shall be chosen by secret ballot of the qualified electors of their respective district.

Section 9. Term of Office. Each Senator shall hold office for a term of four years.

Representatives shall each hold office for a term of two years.

The terms of all members of the Congress shall commence at noon on the third day of January following their election, except as otherwise provided by law.

Section 10. Disqualification of Government Officers and Employees. Any person employed by any branch of the Government of the Trust Territory, or any political subdivision thereof, shall be accorded leave without pay, for a period not to exceed 30 days prior to and including the day of the election, for the purpose of seeking election to the Congress. If any such person is elected, he shall resign from his employment with the Government of the Trust Territory, or any political subdivision thereof, prior to the date upon which his term of office commences.

No person serving as a member of a legislative body of any political subdivision of the Government of the Trust Territory shall be eligible, while so serving, to serve as a member of the Congress of Micronesia.

No member of the Congress shall receive any compensation, other than that provided for in this order, from the Government of the Trust Territory or any political subdivision thereof.

Section 11. Sessions. There shall be a regular session of the Congress held in each year beginning on the second Monday of July and continuing for not to exceed 45 consecutive calendar days. In each odd numbered year there shall also be a regular session of the Congress beginning on the second Monday in January and continuing for not to exceed 15 consecutive calendar days.

The High Commissioner may call special sessions for such period of time and at such time and place, as in his opinion the public interest may require. No legislation shall be considered at any special session other than that specified in the call therefor or in any special message by the High Commissioner to the Congress while in such session.

Section 12. Enacting Clause. The enacting clause of all bills shall be: "Be it enacted by the Congress of Micronesia," and no law shall be enacted except by bill. Bills

may originate in either House, and may be amended or altered or rejected by the other.

Section 13. VETO BY THE HIGH COMMISSIONER. Every bill passed by the Congress shall, before it becomes a law, be presented to the High Commissioner. If the High Commissioner approves the bill, he shall sign it. If the High Commissioner disapproves the bill, he shall, except as hereinafter provided, return it, with his objections, to the Congress within ten consecutive calendar days after it shall have been presented to him. If the High Commissioner does not return the bill within such period, it shall be a law in like manner as if he had signed it, unless the Congress by adjournment prevents its return, in which case it shall be a law if signed by the High Commissioner within thirty days after it shall have been presented to him; otherwise it shall not be a law.

When a bill is returned by the High Commissioner to the Congress with his objections, each House may proceed to reconsider it. If the bill is repassed by both Houses of the Congress by a two-third's majority of the entire membership of each House, it shall again be presented to the High Commissioner. If he does not approve it within 20 days, he shall send it together with his comment thereon to the Secretary of the Interior. Within 90 days after its receipt by him, the Secretary of the Interior shall either approve or disapprove the bill. If he approves it, it shall become a law; otherwise it shall not. The foregoing provision shall not preclude the reconsideration by the Congress during either of the 1969 regular Sessions of any bill returned by the High Commissioner during the 1968 Session.

If any bill presented to the High Commissioner shall contain several items of appropriation of money, he may object to one or more of such items, or any part or parts thereof, while approving the other items or parts of the

bill. In such case he shall append to the bill, at the time of signing it, a statement of the item or items, part or parts thereof, to which he objects, and the item or items, part or parts thereof, so objected to shall have the effect of being vetoed.

Section 14. Adjournment. Neither House may adjourn for more than two consecutive days nor may either House adjourn *sine die* without the concurrence of the other House.

Section 15. Publication of Laws. The High Commissioner shall cause the resolutions and laws to be published within 30 days after they become law, and shall make provision for their distribution to public officials and sale to the public.

Section 16. Procedure.

(a) Quorum. A majority of the members of each House shall constitute a quorum of such House for the transaction of business. A smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as each House may provide.

(b) Reading of Bills—Passage. A bill in order to become a law shall pass two readings in each House, on separate days, the final passage of which in each House shall be by a majority vote of all the members of such House, which vote shall be entered upon the journal.

(c) Title. Every legislative act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such an act shall be void only as to so much thereof as shall not be embraced in the title.

(d) Certification of Bills from one House to the other. Every bill when passed by the House in which it

originated, or in which amendments thereto shall have originated, shall immediately be certified by the presiding officer and sent to the other House for consideration.

(e) AMENDMENT AND REVISIONS BY REFERENCE. No law shall be amended or revised by reference to its title only; but in such case the act, as revised, or section or subsection as amended, shall be re-enacted and published at full length.

(f) LANGUAGE. All legislative proceedings shall be conducted in the English language: *Provided*, That knowledge of the English language shall not be a qualification for membership in the Congress. Nothing herein shall limit the right of a member to use his native language if he lacks fluency in English, and the Congress shall provide for interpretation into English in such cases.

(g) JOURNAL. Each House shall keep a journal of its proceedings, and publish the same in English.

(h) PUBLIC SESSIONS. The business of the Congress, and of the Committee of the Whole, shall be transacted openly and not in secret session.

(i) PROCEDURAL AUTHORITY. The Congress shall be the sole judge of the elections and qualifications of its members, shall have and exercise all the authority and attributes inherent in legislative assemblies, and shall have the power to institute and conduct investigations, issue subpoenas to witnesses and other parties concerned, and administer oaths.

Section 17. IMMUNITY. No member of the Congress of Micronesia shall be held to answer before any tribunal other than the Congress for any speech or debate in the Congress, and the members shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the sessions of the Congress and in going to and from the same.

Section 18. Compensation and Expenses. Each member of the Congress shall be entitled to receive an annual salary of $3,500, and the President of the Senate and the Speaker of the House of Representatives shall each be entitled to receive an additional $500, all of which amounts shall be payable from funds appropriated by the Congress of the United States, when such funds are appropriated pursuant to estimates submitted by the Secretary of the Interior. Each member shall also be entitled to receive, from funds available to and appropriated by the Congress of Micronesia, travel expenses, an expense allowance, and per diem at the standard Trust Territory Government rates for each day the member is in a travel status to and from sessions of the Congress, while in session, or while on other official legislative business. Per diem shall not be payable to members of the Congress for a regular or a special session when such session is held on the island of their residence. The term "official legislative business" shall mean only legislative business authorized by the Chairman of the pertinent Committee of the Congress of Micronesia and performed by one or more members of that Committee, as designated by the Chairman. Travel shall be performed by the most expeditious and direct means: *Provided*, That compensation, travel, expense allowances, and per diem shall not be allowed in excess of such amounts as may be budgeted therefor.

Section 19. Compensation and Expenses, Interim Provision. Effective for the period beginning January 1, 1, 1969, and ending June 30, 1969, members and officers of the Congress of Micronesia shall be entitled to compensation, travel expenses, an expense allowance, and per diem at the rates prescribed in Section 18 of this order, but all such compensation, travel, expense allowances, and per diem shall be paid from funds available to and appropriated by the Congress of Micronesia.

Section 20. Appointment to new Offices. No member of the Congress shall, during the term for which he was elected or during the year following the expiration of the term for which he was elected, be appointed to any office which was created by the Congress during such term.

Section 21. Vacancies. Whenever, prior to six months before the date of the next general election, a vacancy occurs, the High Commissioner shall call a special election to fill such vacancy. In case of a vacancy occurring within six months of the next general election, no special election shall be held and the District Administrator of the District wherein such vacancy arises may fill such vacancy by appointment.

Section 22. Conversion into a Unicameral Body. At its July 1969 regular session, the Congress shall convene in joint session to consider whether the bicameral legislature should be continued, or whether the legislature should be converted into a unicameral body. The final recommendation to the High Commissioner shall be adopted by a majority vote, and the recommendation shall be submitted to the High Commissioner and by him to the Secretary of the Interior.

Section 23. Legislative Counsel. The Congress of Micronesia may by joint resolution nominate a legislative counsel of its own choosing. The salary and other benefits available to such legislative counsel shall be established and paid by the Congress of Micronesia. The Congress of Micronesia may make budgetary provision for such supporting staff for the legislative counsel and the legislature as it may deem necessary.

Section 24. Amendment. This Part may be amended only by further order of the Secretary of the Interior. The Congress may, during any regular session, by a two-thirds majority vote of the membership of each House, recommend to the High Commissioner the amendment of any Section of this Part. The High Commissioner shall

transmit such recommendation, together with his own recommendations thereon, to the Secretary of the Interior.

PART IV. JUDICIAL AUTHORITY

The judicial authority of the Government of the Trust Territory shall be vested in a High Court for the Trust Territory and such other courts as may be established pursuant to law. The Secretary shall appoint the Chief Justice and Associate Justices of the High Court, may make temporary appointments when a vacancy exists, and in addition may appoint temporary judges to serve on the High Court. The judicial authority shall be independent of the executive and legislative powers. Budgetary requests for the territorial judiciary, with supporting justification, shall be drawn up by the Chief Justice of the Trust Territory and submitted for the approval of the Department of the Interior by the High Commissioner of the Trust Territory as a separate item in the annual budget for the Trust Territory. The High Commissioner should call the attention of the Secretary to any question which he may have regarding the budget for the judiciary.

PART V. GENERAL

PRIOR ORDERS. Department of the Interior Order No. 2876 of January 30, 1964, as amended, and Department of the Interior Order No. 2882 of September 28, 1964, as amended, are hereby superseded. Except for Order No. 2902 dated November 15, 1967, as amended, provisions of other prior orders of the Department of the Interior, insofar as they are inconsistent with the provisions of this order, are hereby superseded. Existing laws, regulations, orders, appointments, or other acts in effect immediately prior to the effective date of this order shall remain in effect until they are superseded pursuant to the provisions of this order.

/s/ STEWART L. UDALL
Secretary of the Interior

December 27, 1968

ORDER NO. 2918, AMENDMENT No. 1

WHEREAS, on December 27, 1968 the Secretary of the Interior promulgated Secretarial Order No. 2918 relating to the Government of the Trust Territory of the Pacific Islands; and

WHEREAS, the said Order No. 2918 in Section 4 of Part III limited the appropriation of funds by the Congress of Micronesia to those amounts available from revenues raised pursuant to the tax laws and other revenue laws in the Trust Territory; and

WHEREAS, Section 11 of Part III provided that regular sessions of the Congress of Micronesia were to be held in July of each year and January of alternate years; and

WHEREAS, Section 13 of Part III establishes the procedure for approval and disapproval of laws passed by the Congress of Micronesia; and

WHEREAS, Section 16 (e) of Part III relates to amendment and revision of legislation by reference; and

WHEREAS, Section 18 of Part III provides for the salary and expenses of members of the Congress of Micronesia; and

WHEREAS, certain revisions in Sections 1 and 3 of Part III are also desirable to clarify the organization of the Congress of Micronesia and the submission of legislation to the Congress of Micronesia by the High Commissioner prior to a legislative session.

NOW THEREFORE, Secretarial Order No. 2918 is amended in the following particulars, the amendments to be effective as of the date of this Amendment except as otherwise provided:

1. The second paragraph of Section 1 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"When a Congress convenes, each House shall organize by the election of one of its number as presiding officer

and such presiding officer shall be designated by the title of 'President of the Senate' or 'Speaker of the House of Representatives,' as the case may be. When the Congress meets in joint session, the Speaker of the House of Representatives shall preside."

2. Section 3 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"Section 3. POWERS OF THE HIGH COMMISSIONER. The High Commissioner may submit to the Congress prior to and during any legislative session legislation for its consideration."

3. Section 4 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"Section 3. BUDGET. Money bills enacted by the Congress of Micronesia shall not provide for the appropriation of funds in excess of such amounts as are available or estimated to be available from revenues raised pursuant to the tax laws and other revenue laws of the Trust Territory: PROVIDED, that the Secretary of the Interior shall, from time to time, define the term 'revenue' as used herein, so as generally to exclude therefrom all sums attributable to user charge or service related reimbursements to the Government of the Trust Territory."

"Prior to his final submission to the Secretary of the Interior of requests for Federal funds necessary for the support of governmental functions in the Trust Territory, the High Commissioner shall prepare a preliminary budget plan. He shall submit such plan to the Congress of Micronesia or the appropriate authorized committee or committees thereof for its review and recommendations with respect to such portions as relate to expenditures of funds proposed to be appropriated by the Congress of the United States. With respect to such portions of the preliminary budget plan, the High Commissioner shall adopt such rec-

ommendations of the Congress or the appropriate authorized committee or committees thereof as he shall deem appropriate, but he shall transmit to the Secretary of the Interior all recommendations he has not adopted."

"For Fiscal Years 1971 and 1972, the Congress of Micronesia is authorized $125,000 from Federal grants appropriated to the Trust Territory of the Pacific Islands by the Congress of the United States, for operation and expenses of the Congress of Micronesia. For succeeding fiscal years, the Congress of Micronesia may request continuing or additional funds for its operations and expenses. Such requests shall be incorporated in the High Commissioner's preliminary budget plan for processing as set forth in this section."

4. The first paragraph of Section 11 of Part III of the said Order No. 2918 is hereby amended to read as follows, such amendment to become effective January 1, 1971:

"Section 11. SESSIONS. There shall be a regular session of the Congress held in each year beginning on the second Monday in January and continuing for not to exceed 50 consecutive calendar days."

5. Section 13 of Part III of the said Order No. 2918 is hereby amended to read as follows, such amendment to become effective January 1, 1971:

"Section 13. APPROVAL OR DISAPPROVAL BY THE HIGH COMMISSIONER. Every bill passed by the Congress shall be certified by the presiding officers and clerks of both Houses and shall thereupon be presented to the High Commissioner. he approves, he shall sign the bill and it shall become law. If the High Commissioner disapproves, he shall so indicate and return it with his objections to the Congress within ten consecutive calendar days after it shall have been presented to him. If the High Commissioner takes no action and does not return the bill within such period, it shall be a law in like manner as if he had signed it, unless the Congress by adjournment prevents its return.

The High Commissioner shall have 30 days to consider bills presented to him less than ten days before adjournment or presented after adjournment. If he approves, he shall sign the bill and it shall become law. If the High Commissioner disapproves, he shall so indicate and return it with his objections to the Congress within thirty consecutive calendar days after it shall have been presented to him. If the High Commissioner takes no action and does not return the bill within such period, it shall be a law in like manner as if he had signed it.

When a bill is disapproved and returned by the High Commissioner to the Congress with his objections, each House may proceed to reconsider it. If such a bill is repassed by both Houses of the Congress by a two-thirds majority of the entire membership of each House (one reading being required in each House for such passage), it shall be presented again to the High Commissioner. If he does not approve it within twenty days after presentation, he shall send it together with his comments thereon to the Secretary of the Interior. Within sixty day after its receipt by him, the Secretary of the Interior shall either approve or disapprove the bill. If he approves it, it shall become a law; otherwise it shall not.

If any bill presented to the High Commissioner shall contain several items of appropriation of money, he may object to one or more such items, or any part or parts thereof, while approving the other items or parts of the bill. In such case he shall append to the bill, at the time of signing, a statement of the item or items, part or parts thereof, so objected to, and the item or items, part or parts thereof so objected to shall have the effect of being vetoed."

6. Section 16 (e) of Part III of the said Order 2918 is hereby amended to read as follows, such amendment to become effective January 1, 1971:

"Section 16(e). AMENDMENT AND REVISION BY REFERENCE PROHIBITED. No law or section of the law shall be amended

or revised by reference to its title only, but in every instance such amendment or revision of the law or section thereof shall be published at full length and in its entirety as amended or revised and shall be re-enacted."

7. Section 18 of Part III of the said Order No. 2918 is hereby amended to read as follows:

"Section 18. Compensation and Expenses. The members of the Congress of Micronesia shall receive compensation for their services and expenses as may be prescribed by law. Such compensation and expenses shall be from funds available to and appropriated by the Congress of Micronesia. The Congress may at no time increase the salaries of the incumbents during the current Congress. If the Congress of Micronesia should provide for an increase in the annual compensation paid to members for their services such increase will apply to succeeding Congresses only. Per diem, if paid to the members of Congress, shall be in compliance with the standard Trust Territory rates. Compensation, expenses, per diem, etc., shall not be allowed in excess of such amounts as may be budgeted therefor."

8. Section 21 of Part III of the said Order No. 2918 is hereby amended to read as follows, said amendment to become effective January 1, 1971:

"Section 21. Vacancies.

(a). Whenever a vacancy in the membership of the House of Representatives occurs, the Speaker of the House of Representatives shall notify the High Commissioner and the High Commissioner shall then call a special election to fill such vacancy: Provided, that no special election shall be held if such vacancy occurs less than ninety days prior to the next succeeding general election.

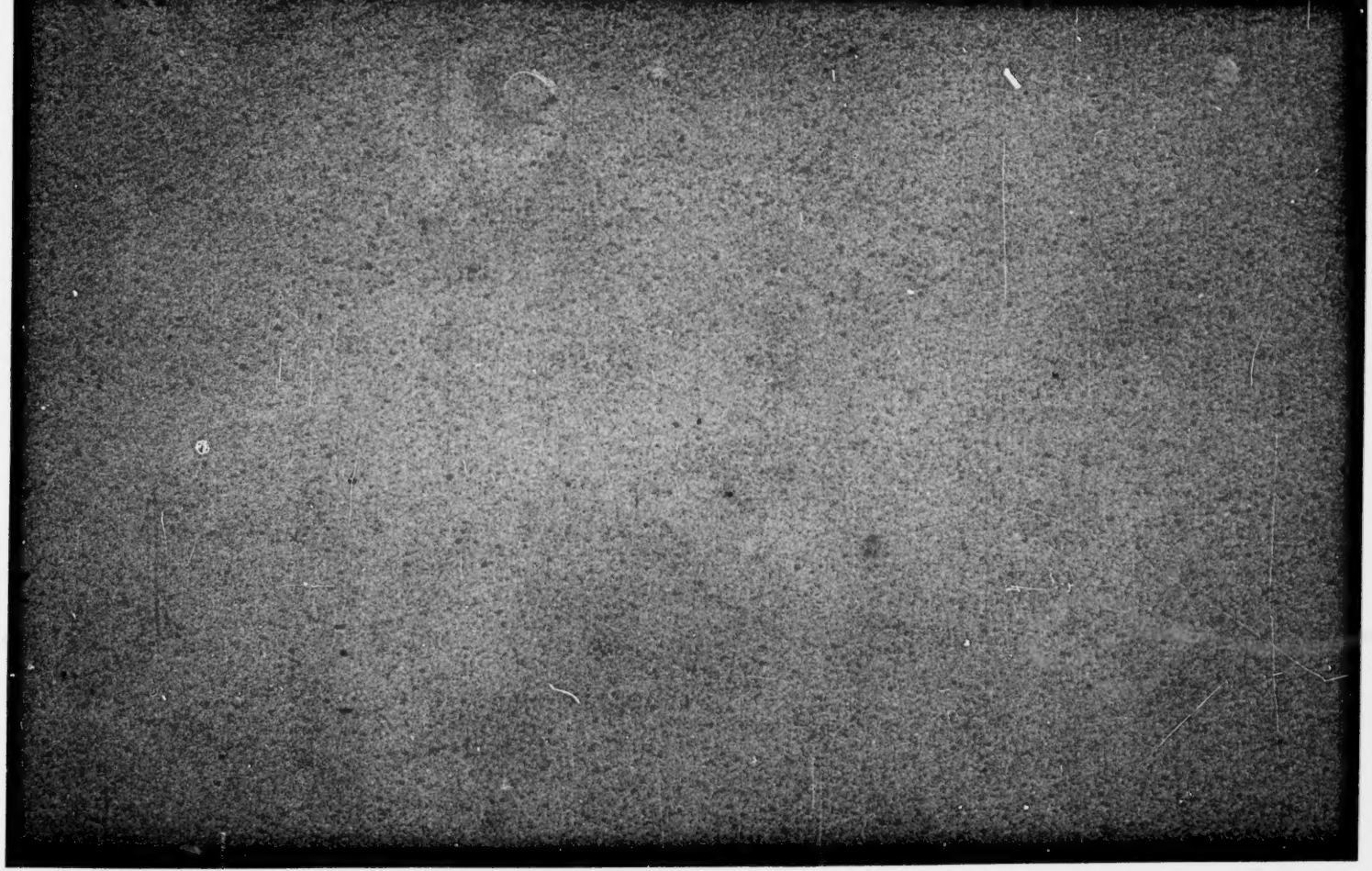
(b). Whenever a vacancy in the membership of the Senate occurs, the President of the Senate shall notify the High Commissioner. If a vacancy occurs sixty days or

more prior to the next succeeding general election, the High Commissioner shall make temporary appointment to fill such vacancy. The appointee shall be from the same administrative district as the person whom he succeeds and shall serve until the next succeeding general election at which time he shall be replaced by a regularly elected Senator who, unless the term of the person he succeeds shall have expired at the time of such election, shall serve only for the unexpired term of such person. In the event the election is for an unexpired term only, the High Commissioner shall issue a proclamation designating the election for the filling of such unexpired term."

9. Sections 19-23 [illegible] 123 of Part III of the said Order No. 2918 are hereby repealed in their entirety.

/s/ WALTER J. HICKEL
Secretary of the Interior

August 13, 1970



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Supreme Court, U. S.
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DEC 20
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

[redacted]

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands,
Respondents,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition for Respondent Continental Air Lines, Inc.

COOPER, WHITE & COOPER
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 72-644

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands,
Respondents,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition for Respondent Continental Air Lines, Inc.

OPINIONS BELOW

The majority opinion of the Court of Appeals and the separate opinion of Judge Trask concurring in the result (collectively Appendix B of the Petition) are now reported at 502 F.2d 90.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is approval by the government of the Trust Territory of the Pacific Islands of a lease for construction of a private hotel on the island of Saipan subject to the U. S. National Environmental Policy Act?

2. Is the High Court of Micronesia the appropriate forum for determination of a suit first commenced there by Trust Territory citizens to review actions of the Trust Territory Government?

STATUTES AND REGULATIONS INVOLVED

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 is set out as Appendix C to the Petition. The Trusteeship Agreement (61 Stat. 3301), 48 U.S.C. § 1681(a), Executive Order No. 11021 and Department of the Interior Order No. 2918 are set out in Appendix D to the Petition. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, is set out as Appendix 1 to this Brief in Opposition.

STATEMENT OF THE CASE

This lawsuit arises from approval by the Government of the Trust Territory of the Pacific Islands (Micronesia) of a 30-year lease of public land to respondent Continental for construction of a resort hotel adjacent to Micro Beach on the Micronesian island of Saipan.[1] Petitioners, Micro-

1. Though the Micronesian island system ranges over three million square miles of ocean, its total land area is 687 square miles. Only 64 of the some 2,000 islands are regularly inhabited (Trust Territory of the Pacific Island 1960, 13th Annual Report of the United Nations [Dept. of State publication 7183, 1961]).

nesian citizens, seek to restrain construction of the hotel and use of the land by Continental. Relief was denied at all stages below.

Since 1947 the United States has had administrative responsibility for Micronesia under a Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301 (1947), executed between the United States and the United Nations. Petition, Appendix D, 57a. The United States is, however, not sovereign there, and the Trust Territory is neither a territory, possession nor dependency of the U. S.

The Trusteeship Agreement obligates the United States in part to "promote the development of the inhabitants of the trust territory toward self-government or independence" as is appropriate to local conditions and wishes and progressively to increase participation in government by the native peoples. Trusteeship Agreement, Art. 6(1). Accordingly, a republican form of government has been established there, including executive and judicial branches and an indigenously elected legislature. Dept. of Interior Order No. 2918, Parts II-IV (Petition, Appendix D, 65a). Though the chief executive officer, the High Commissioner, is presently appointed and subject to technical supervision by U.S. officials,[2] the local government operates substantially autonomously in domestic affairs.

Important changes in U.S.-Micronesian relations are expected to result from current political status talks between the two peoples. See discussion *infra*.

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2. Pending its further provision therefor, Congress has empowered the President to delegate responsibility for U.S.—Trust Territory relations as he chooses. 48 U.S.C. § 1681(a) (Petition, Appendix D, 61a). Pursuant to Executive Order No. 11021, 3 C.F.R. 1959-63 Comp. at 600 (May 7, 1962) (Petition, Appendix D, 61a), that responsibility now rests with the Secretary of Interior and his designates. The High Commissioner is appointed by the President with the advice and consent of the Senate. 48 U.S.C. § 1681a.

Petitioners argue here, as they did below, that approval of the lease by the Trust Territory Government was a significant "Federal action" of a "Federal" agency undertaken in violation of § 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), since no "environmental impact statement" (EIS) was prepared and considered.

That contention has been uniformly rejected by the three separate courts to which it has already been presented.

Many of these petitioners first sought to enjoin construction of the hotel by commencing suit against Continental and the High Commissioner in the High Court of Micronesia. *Guerrero, et al. v. Johnston, et al.*, No. 1064 (1972). There, both NEPA and causes of action based upon local law were raised. The court's Trial Branch declined to grant in full defendants' motion to dismiss but, in an interlocutory opinion and order, determined that NEPA was inapplicable to actions of the Trust Territory Government. Petition, Appendix B, 34a, n. 6.

Thereupon, while the High Court suit was still pending, petitioners commenced this action in the U. S. District Court for Hawaii.[3] Again petitioners claimed that approval of the lease had violated NEPA. Additionally, they asserted that the High Commissioner's actions were independently reviewable by the Federal courts against the Trusteeship Agreement itself.[4]

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3. The High Court, by its order dated January 28, 1973, stayed all proceedings there pending final judgment in the Federal action.

4. Unlike the territories and possessions of the United States (other than Samoa), the Trust Territory is not within the territorial jurisdiction of any Federal District Court. 28 U.S.C. §§ 81-131, 48 U.S.C. § 1424, including the District of Hawaii. 28 U.S.C. § 91.

Petitioners' motion for a temporary restraining order was denied. Subsequently, respondents' motions to dismiss were granted. The District Court, in an opinion by Judge Samuel P. King, concluded that it lacked subject matter jurisdiction since (1) the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA), excluded the Trust Territory Government from review by the Federal courts, (2) the lease approval was not a "Federal" action of a Federal "agency" for purposes of NEPA, and (3) the Trusteeship Agreement did not create independent rights capable of judicial enforcement. Petition, Appendix A. In disclaiming the "Federal" nature of the lease approval, the District Court found specifically that Interior Department officials had not participated in any way in the decision to grant the lease. *Id.* The District Court denied an injunction pending appeal, as did the Court of Appeals.

On the merits, the Court of Appeals, in another extensive opinion, affirmed the District Court's conclusion that acts of the Trust Territory were not reviewable by Federal courts under the APA and NEPA. However, the Court found that the Trusteeship Agreement itself created standards of conduct for Trust Territory officials which could be judicially enforced by Micronesian citizens. Acting on principles of comity, the Court held that enforcement of these rights should first be sought in the High Court of Micronesia. Petition, Appendix D. If that court declined to take jurisdiction, petitioners were to be permitted to refile their suit in the District Court of Hawaii. *Id.*[5]

REASONS FOR DENYING THE PETITION

This case presents the most compelling grounds for denial of the petition for certiorari. The Court of Appeals

5. Construction of the hotel had begun prior to commencement of any litigation and has been largely completed during its two-year pendency.

has correctly decided the matter. There is no conflict among the lower Federal courts on the issues presented. Most importantly, the facts and issues of this case are particularly anomalous and inappropriate for intervention by this Court now.

1. The Court of Appeals Correctly Decided That NEPA Does Not Apply to Local Actions of the Trust Territory Government.

NEPA's requirement that an EIS be prepared and considered is applicable only to "major Federal actions" by "agencies of the Federal government." 42 U.S.C. § 4332. The Court of Appeals found the District Court's decision that NEPA did not apply to this lease to be correct and supportable on at least four separate grounds:

> (1) that the APA's exclusion of the "governments of the territories and possesions of the United States" from judicial review as Federal "agencies", 5 U.S.C. § 701(b)(1)(C), applied to the government of the Trust Territory and established that the NEPA reference to Federal "agencies", 42 U.S.C. § 4332(2)(C), also excluded the Trust Territory Government. Petition, Appendix B, 31a-32a.
>
> (2) that Congress had not legislated, pursuant to Article 12 of the Trusteeship Agreement, to make NEPA applicable to the Trust Territory Government. Petition, Appendix B, 34a and n. 6.
>
> (3) that there was no participation by Interior Department officials in the decision to grant the lease. Petition, Appendix B, 33a.
>
> (4) that the strong impetus for increased self-government provided by the Trusteeship Agreement,
>
> ". . . constrains us not to hold that the actions of the local government are reviewable in the same manner as the actions of domestic federal administrative agencies, in a federal district court several thousand miles from the islands." Petition, Appendix B, 33a.

That the APA exempts the Trust Territory Government from review as a Federal "agency" is virtually indisputable. Congressional sponsors of the APA (enacted prior to execution of the Trusteeship Agreement) made clear that the exclusions from the definition of "agency' contained in § 701 of the Act were conceived on broad and functional lines. 92 Cong.Rec. 2150 (1946); H.R.Rep.No. 1980, 1946, U.S. Code Cong. & Ad. News 1195, 1205. In insulating the governments of territories and possessions from review as Federal agencies, Congress manifestly intended to encompass all functionally analogous governments created pursuant to Congressional authority.

Petitioners offered no persuasive argument to the contrary in either court below.

Similarly, petitioners advanced no credible reason why the same rules on the scope of review should not apply to NEPA, which, like the APA, is expressly concerned with Federal "agencies". Both courts predictably concluded that since the Trust Territory Government is not subject to Federal court review as a Federal "agency" at all, *a fortiori* it is not subject to review as a Federal "agency" for purposes of NEPA. Petition, Appendix A, 22a; Appendix B, 31a-32a.[6]

The Court of Appeals also rejected petitioners' suggestion that the High Commissioner is bound by the Trusteeship Agreement to follow NEPA. Article 12 of the Trusteeship Agreement empowers the United States "to enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory."

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6. Both courts rightly perceived that this result could not be altered by characterizing the High Commissioner as a Federal "official" or "agent" subject to NEPA, separate and apart from the Trust Territory Government as a whole. Petition, Appendix A, 21a-22a; Appendix B, 33a. Were it otherwise, the APA exclusion of territorial governments from review as Federal "agencies" would be meaningless.

Petition, Appendix D, 60a. The Court found no intention by Congress to legislate pursuant to Article 12 to make NEPA applicable to the Trust Territory Government. Petition, Appendix B, 34a and n. 6.[7]

Moreover, evidence presented to the District Court on two occasions established that, in fact, the Trust Territory Government and the High Commissioner operated autonomously and without Interior Department participation in deciding to grant the lease. From the record before it, the District Court found that:

> ". . . officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form. . . ." Petition, Appendix A, 22a, n. 28.

The Court of Appeals implicitly affirmed this determination. Petition, Appendix B, 33a.[8]

Finally, the Court of Appeals pointed to the Trusteeship Agreement's mandate for increasing autonomy for Micronesia and the evolving nature of the Trust Territory's relationship with the United States. Wisely, it decided that the

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7. Equally appropos is Article 3, which empowers the United States to apply to the Trust Territory, subject to any desired modification, "such of the laws of the United States as it may deem appropriate to local conditions and requirements." Petition, Appendix D, 56a. The "local conditions and requirements" of Micronesia do not necessarily admit of a statutory scheme designed for the U.S. government establishment. Articles 3 and 12 make clear that U.S. laws do not apply to the Trust Territory Government in the absence of a specific expression of Congressional intent.

8. Petitioners complain strenuously that the District Court improperly permitted introduction of evidence on a motion to dismiss without treating the motion as one for summary judgment under Rule 56(c), Fed.R.Civ.Pro., and without affording petitioners an adequate opportunity to demonstrate participation by Interior Department officials in the lease decision. Petition, 12. Assuming without conceding that this was error, it was harmless, since the Court of Appeals' conclusions that NEPA is inapplicable do not stand or fall upon that issue.

Federal courts, widely removed from these far-flung islands and facing a rapidly changing political situation there, were not the appropriate primary forum for resolution of questions about the activities of the local government. Petition, Appendix B, 33a.

In holding the Trust Territory Government itself immune from review under the APA and NEPA, the Court of Appeals carefully analyzed and distinguished such cases as *People of Eniwetak v. Laird*, 353 F.Supp. 811 (D.Hawaii 1973) (holding NEPA applicable to an agency of the executive branch of the United States government, the Air Force Department, operating directly inside the Trust Territory); *Bell v. Commissioner*, 278 F.2d 100 (4th Cir. 1960); *Kam Koon Wan v. E. E. Black, Ltd.*, 188 F.2d 558 (9th Cir.), *cert. denied*, 342 U.S. 826 (1951) (holding governments of United States territories to be agencies of the Federal Government for purposes of income taxation and the Portal-to-Portal Act, respectively); *Callas v. United States*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958); *Brunell v. United States*, 77 F.Supp. 68 (S.D.N.Y. 1948) (both holding Trust Territory not to be a part of the U.S. for purposes of Federal Tort Claims Act); and *Richard W. Benfer*, 45 T.C. 277 (1965) (holding the Trust Territory not to be a U.S. territory or possession for purposes of income taxation).[9]

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9. See also *Aradanas v. Hogan*, 155 F.Supp. 546 (D.Hawaii 1957); *Application of Reyes*, 140 F.Supp. 130 (D.Hawaii 1956) (both holding Trust Territory not a part of United States for purposes of Immigration and Nationality Act); and *Pauling v. McElroy*, 164 F.Supp. 390 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C.Cir.), *cert. denied*, 364 U.S. 385 (1960) (holding Trust Territory citizens without standing to seek Federal court review of constitutionality of proposed Marshall Islands nuclear tests). Both opinions below note that no Federal court has heretofore undertaken review of activities of the Trust Territory Government as a Federal "agency". Petition, Appendix A, 19a; Appendix B, 32a.

On the other hand, the Court gave weight to a recent Court of Claims decision, *Porter v. United States*, 496 F.2d 583 (Ct.Cl. 1974), virtually on point with this case. Petition, Appendix B, 32a, n. 5. *Porter* held that a contract negotiated and administered by the Trust Territory Government was not that of a Federal "agency", and that a direct suit against the United States could therefore not be maintained for its breach. If the word "lease" is substituted for "contract" in the Court of Claims decision, its holding and that of both lower courts here are identical.

The courts below correctly determined that neither the Trust Territory Government or its individual functionaries are Federal "agencies" for purposes of NEPA.

2. The Court of Appeals Correctly Decided That the High Court of Micronesia Is the Appropriate Forum for Initial Review of the Lease Approval.

Petitioners assert that the Court of Appeals erred fundamentally by referring the remaining issues in this case to the High Court of Micronesia and limiting Federal judicial review of its disposition. Petition, 8-11. This contention is especially difficult to understand since petitioners (or most of them) originally brought the same controversy before the Trust Territory court, where it is still pending. It is unclear whether petitioners believe they initially misconceived the High Court's power to grant the relief they seek, or have simply sought relief *de novo* from the Federal judiciary because they became dissatisfied with the High Court's interlocutory rulings.

In any event, whether the Court of Appeals' decision to defer to the High Court be denominated an example of the doctrine of abstention, comity, or exhaustion of remedies, its wisdom is clear.

The High Court of Micronesia constitutes the judicial authority of the Trust Territory Government, is expressly

independent of the executive and legislative powers, and is the court of general jurisdiction for Micronesia. Dept. of Interior Order No. 2918, Part IV.

It is, therefore, that tribunal before which petitioners should seek their day in court. This is especially so since petitioners selected that forum in the first place, *Blue v. Mathena*, 259 F.Supp. 926, 928 (S.D.W.Va. 1966); and since the Court of Appeals has, in effect, found the Trusteeship Agreement to be the quasi-constitutional charter of Micronesia.[10] The High Court's jurisdiction, even if concurrent with that of the Federal courts, is entitled to priority.

Moreover, the Court of Appeals obviously intended to accord the High Court maximum deference in view of the Trusteeship Agreement's mandate for promoting Micronesian self-government. The Court has avoided entangling Micronesia in the processes of a widely removed U.S. Federal judicial system ill-equipped to resolve controversies there.

Petitioners cite cases for the proposition that the principles of comity do not apply to the courts of a territory or possession of the United States, since the purpose of pro-

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10. Since the High Commissioner acted pursuant to local statutes in granting the lease, the controversy will center upon the validity of those statutes, per se or as applied, under the Trusteeship Agreement. Petition, Appendix B, 40a. The doctrine of abstention, applicable between state and federal courts in the interest of federalism, teaches that construction of local laws should be left in the first instance to the local courts, especially where a local action involving the same parties is already pending. *Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 171-172 (1942); *Meredith v. Winter Haven*, 320 U.S. 228, 236 (1943). Application of a similar principle is appropriate here. Should the High Court, despite the Court of Appeals' clear expression of a contrary view, adhere to its own prior decisions that it cannot review the High Commissioner's acts against the Trusteeship Agreement, *Schulz v. Peace Corps*, 4 Trust Territory Reports 428 (1969); *Alig v. Trust Territory*, 3 Trust Territory Reports 603 (1967), the Federal courts are open to petitioners. Petition, Appendix B, 42a.

tecting local sovereignty is lacking. Petition, 10. Of course, the Trust Territory is not a U.S. territory or possession and is not subject to U.S. sovereignty at all. Administration of the Trust Territory, unlike that of the territories and possessions, is subject to an agreement with the United Nations calling for an ever-increasing measure of independence for the area. The tripartite-republican government now operating there (which includes the High Court) is an important step toward achieving that goal. Traditional policy considerations for applying the doctrine of comity are therefore strongly in evidence.

Since the Court of Appeals has reserved jurisdiction should the High Court (either in the first instance or on appeal) decline to accept it, Petition, Appendix B, 42a, petitioners have been deprived of no rights. Their claims to the contrary do not warrant this Court's further attention.

3. There Is No Conflict Among Lower Courts.

A number of Federal cases has considered various aspects of the relationship between the United States and the Trust Territory.[11] Only one other than the matter at bar has passed upon the precise question at issue here: the legal status of the Trust Territory Government in the exercise of its local governmental functions. That case, *Porter v. United States, supra,* 496 F.2d 583 (Ct.Cl. 1974), resolved the issue precisely as the Court of Appeals here has done. There is no need to reconcile conflicting Federal court decisions by the device of certiorari.

4. This Controversy Is Inappropriate for Intervention by the Court Now.

Pursuant to its obligations under Article 6(1) of the Trusteeship Agreement, the United States is engaged in negotiations with representatives of the Congress of Micro-

11. See authorities cited, *supra,* p. 9 and Note 9 thereon.

nesia, aimed at establishing the future political status of the area.[12] As the District Court noted, the talks will almost certainly result in a vastly altered political and legal relationship between the two peoples, and in a greatly revised structure of government for Micronesia. Petition, Appendix A, 18a, n. 23.

Under these circumstances, the writ of certiorari would:

(1) enmesh a separate and emerging people in the web of a U.S. law not designed or intended for application to them;

(2) commit this Court to a decision which, considering the evolving political situation, quite possibly will not apply to any future controversy; and

(3) frustrate the current government's legitimate efforts to promote the economic development of these barren and isolated islands.

Of course, the United States will retain its responsibilities in the Trust Territory as long as the Trusteeship Agreement remains in effect. Those responsibilities can, however, be most usefully construed by this Court, if at all, in the context of the more permanent political relationship contemplated by the status talks.

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12. The talks have been underway since 1969. The United States is represented by a Presidential envoy, Ambassador Franklin Hayden Williams; the Micronesian side by a committee of the Congress of Micronesia. During 1972, tentative agreement was reached on a "draft compact" which would place Micronesia for the immediate future in a relationship of "free association" with the United States. Under the proposal, Micronesia would attain full responsibility for its domestic affairs and its own form of government; the United States would retain responsibility for foreign affairs and defense. Difficulties have since arisen because of the differing wishes of the various districts of Micronesia, and representatives of the Marianas district (which includes Saipan) have conducted separate negotiations with the United States. See Progress Report on Trust Territory Status Negotiations, Hearing Before the House Subcommittee on Territorial and Insular Affairs, 93d Cong., 1st Sess., Serial No. 93-4 (1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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(Appendix Follows)

Appendix 1

Administrative Procedure Act
(5 U.S.C. §§ 701-706)

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1943, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

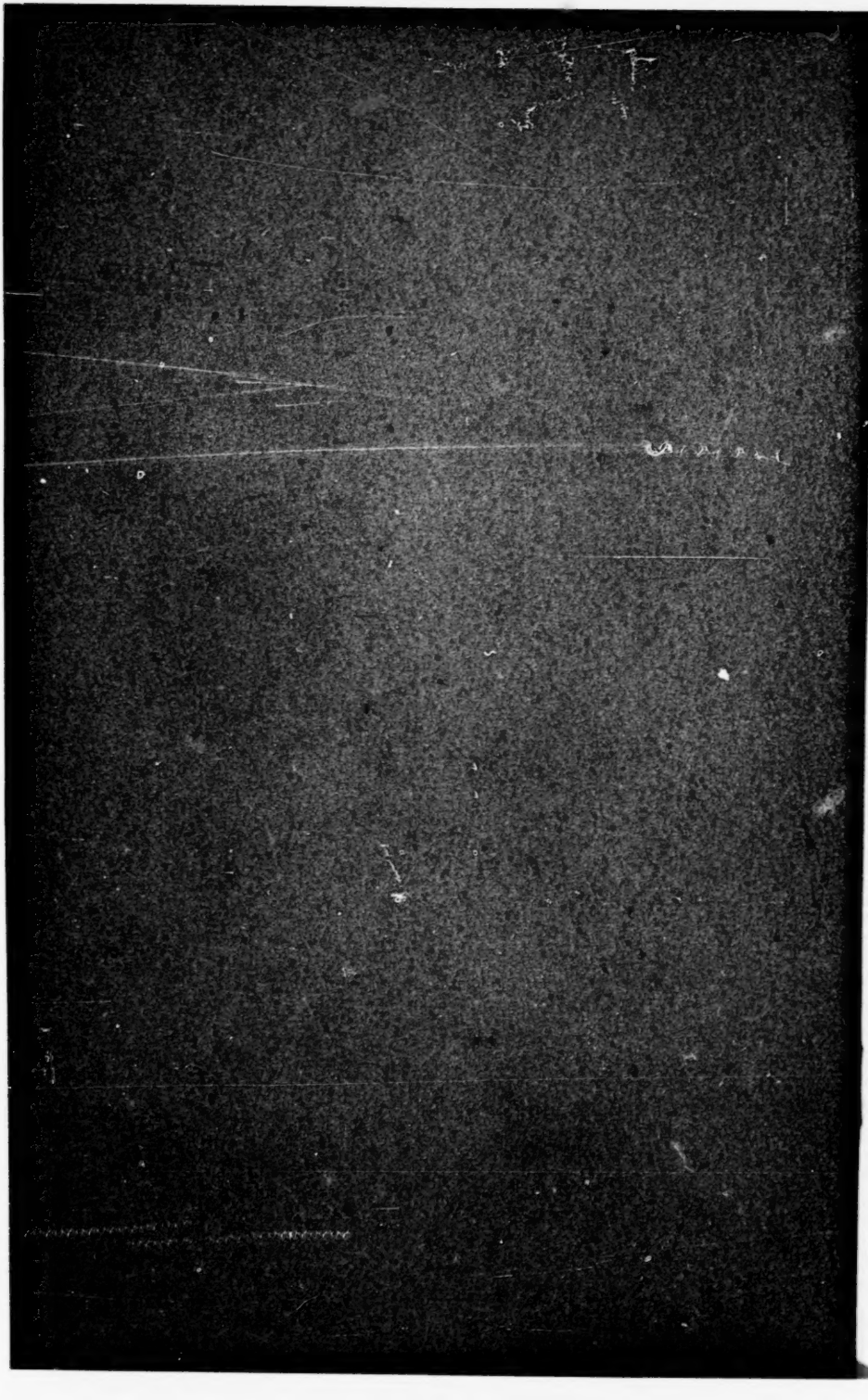
(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or other-

wise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.



SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-622

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands,
Respondents,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Respondent.

Brief of Respondent Edward E. Johnston, High Commissioner of the Trust Territory of the Pacific Islands, In Opposition to Petition for a Writ of Certiorari

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-622

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands,
Respondents,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Respondent.

Brief of Respondent Edward E. Johnston, High Commissioner of the Trust Territory of the Pacific Islands, In Opposition to Petition for a Writ of Certiorari

QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act should apply to actions taken by the Government of the Trust Territory of the Pacific Islands, in conformity with local laws but independently of the Secretary of the Interior.

2. Whether the federal courts should interfere with the judicial and political process of the Trust Territory of the Pacific Islands.

STATUTORY PROVISIONS INVOLVED

The National Environmental Policy Act, Subchapter I, 42 U.S.C. §§ 4321-4335 is set out in Appendix C at 50a of the Petition.

The Trusteeship Agreement (61 Stat. 3301), 48 U.S.C.A. § 1681(a), Executive Order No. 11021, and Department of the Interior Order No. 2918 are set out in Appendix D at, respectively, 55a, 61a, 61a, and 64a of the Petition.

48 U.S.C.A. § 1681a is set out in Appendix A at 1a of this Brief in Opposition. 1 T.T.C. § 101 is set out in Appendix B at 2a of this Brief in Opposition. The Trust Territory Environmental Quality Protection Act, 63 T.T.C. §§ 501-509, is set out in Appendix C at 3a of this Brief in Opposition. 61 Stat. 397 is set out in Appendix D at 11a of this Brief in Opposition. 6 T.T.C. § 357 is set out in Appendix E at 12a of this Brief in Opposition.

STATEMENT OF THE CASE

The petitioners herein are citizens of the Trust Territory of the Pacific Islands also known as Micronesians, and are residents of Saipan, Mariana Islands District. Respondents are the Department of the Interior of the United States; Roger C. B. Morton, Secretary of the Interior; Stanley S. Carpenter, Director of the Office of Territories of the Department of the Interior; Edward E. Johnston, High Commissioner of the Trust Territory of the Pacific Islands; and Continental Air Lines, Inc., a Nevada corporation.

The Trust Territory of the Pacific Islands, which includes Saipan, Mariana Islands District, is administered by the United States pursuant to a Trusteeship Agreement for

the Former Japanese Mandated Islands, between the Government of the United States and the Security Council of the United Nations (Petition, Appendix D, 55a).

Petitioners' contention is that execution of a lease of public land adjacent to Micro Beach, Saipan, Mariana Islands District, which was processed and approved by the High Commissioner pursuant to local law, was improperly found by the District Court of the District of Hawaii to be a local action not in violation of the National Environmental Policy Act (Petition, Appendix A, 1a-27a).

Petitioners further contend that the execution of said lease to a foreign corporation was a violation of the Trusteeship Agreement.

REASONS FOR DENYING THE WRIT

1. Federal Courts Should Not Apply the National Environmental Policy Act to the Actions of the Government of the Trust Territory of the Pacific Islands, or Those of the High Commissioner When Taken in His Capacity as Chief Executive Thereof Pursuant to Local Laws.

The National Environmental Policy Act applies by its terms to ". . . agencies of the Federal Government . . ." 42 U.S.C.A. § 4332 (Petition, Appendix C, 51a-53a).

The United States of America is merely designated as the Administering Authority under and pursuant to the Trusteeship Agreement for the Former Japanese Mandated Islands. Art. 2 (Petition, Appendix D, 56a). Because the Trust Territory is neither a possession nor a territory of the United States, *a fortiori*, it is not a federal agency. The High Commissioner, who is appointed by the President, is the chief executive officer of the Trust Territory. 48 U.S.C.A. § 1681a (Appendix A, 1a); Part II, § 1, Department of the Interior Order No. 2918 (Petition, Appendix D, 65a). A basically republican form of government has been created

in the Trust Territory of the Pacific Islands with executive, legislative and judicial branches. Parts II, III and IV, Department of the Interior Order No. 2918 (Petition, Appendix D, 65a-77a). It is true that the Secretary of the Interior does have responsibility for administration of the Trust Territory. Executive Order No. 11021 (Petition, Appendix D, 62a-63a); see 48 U.S.C.A. § 1681(a) (Petition, Appendix D, 61a). However, the existence, purpose and functioning of the Congress of Micronesia, elected by the citizens, cannot be ignored.

The Trusteeship Agreement, in giving full powers of administration, legislation and jurisdiction, states that the United States

> ". . . may apply to the Trust Territory, subject to any modifications which the administering authority may consider desirable such laws of the United States as it may deem appropriate to local conditions and requirements." Art. 3 (Petition, Appendix D, 56a).

On this question of applicability of United States laws to the Trust Territory,

> "*Additional laws applicable to Trust Territory.* The following are declared to be in full force and to have the effect of law in the Trust Territory of the Pacific Islands:
>
> (1) the Trusteeship Agreement;
>
> (2) such laws of the United States, as shall, by their own force, be in effect in the Trust Territory, including the Executive Orders of the President and orders of the Secretary of the Interior; . . ." 1 T.T.C. § 101 (Appendix B, 2a).

It is our contention that the phrase "by their own force" means that the Trust Territory of the Pacific Islands must be specifically stated in such United States laws in order for them to apply to the Trust Territory. In other words,

when a given federal statute, such as the National Environmental Policy Act, fails to specifically mention the Trust Territory of the Pacific Islands, by name, within its coverage, then the courts must not extend the coverage of such federal statute by reading into it a non-expressed intent of the lawmakers. By its own terms, the Trusteeship Agreement *does not require the United States to apply its laws* to the Trust Territory. Article 3 of the Trusteeship Agreement merely gives the United States discretionary power to apply its laws to the Trust Territory. Furthermore, the phrase "subject to any modifications which the administering authority may consider desirable such laws of the United States as it may deem appropriate to local conditions and requirements" clearly indicates that the United States in applying any of its laws to the Trust Territory may modify that particular law to effectively deal with such local conditions and requirements. In other words, the United States is not required by the Trusteeship Agreement to extend its laws *in toto* or at all to the Trust Territory. Given these broad discretionary powers, the United States must, therefore, make its intention to apply a particular law to the Trust Territory of the Pacific Islands abundantly clear.

This requirement of clearly manifested intent is inherent in the authority and increasing role of the Congress of Micronesia in the legislative process. The terms of the Trusteeship Agreement and the voluntary action of the Administering Authority in delegating its legislative authority to the Congress of Micronesia appear to preclude courts from extending a particular federal statute, such as the National Environmental Policy Act, to the Trust Territory of the Pacific Islands in the absence of a specific reference to the Trust Territory. This is particularly true

in this case because the Congress of Micronesia has since enacted a law to protect the environment. 63 T.T.C. § 501-509 (Appendix C, 3a-10a).

2. The Court of Appeals, in Reaching Its Decision Has Maintained the Proper Balance Between Individual Rights and the Promotion of Self-Government for Micronesia (Petition, Appendix B, 28a-49a).

Article 6 of the Trusteeship Agreement requires the administering authority not only to ". . . protect the inhabitants against the loss of their land and resources . . ." but also to ". . . foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government as may be appropriate . . .". Article 6 (Petition, Appendix D, 57a-58a). The obligation for political development of Micronesia started when the Trusteeship came into force upon its approval by the President on July 18, 1947, pursuant to the authority of a joint resolution of Congress of the same date. 61 Stat. 397 (Appendix D, 11a).

Throughout this period, the people of Micronesia have accepted and learned to live with the provisions of the Trust Territory Code which states that "Unless and until the Congress of the United States provides for an appeal to a court created by Act of Congress, the decisions of the Appellate Division of the High Court shall be final." 6 T.T.C. § 357 (Appendix E, 12a). Although the people of the Trust Territory would probably want to have a right to appeal cases to this court because of the great respect for this court held by Micronesians in general, the fact that decisions of the Appellate Division of the High Court are final has given the High Court the same degree of respect and stature given to "courts of last resort."

The United States Government, through its representatives, and the Congress of Micronesia, through its Joint Committee on Future Status, have for several years now, been conducting negotiations for a future political status of the Trust Territory of the Pacific Islands. Viewed in the light of the Proposal of the Joint Committee on Future Status of the Congress of Micronesia dated July 12, 1974, for a "Compact Between the People of Micronesia and the United States of America", there is contemplated a future government of Micronesia having full responsibility for and authority over all matters which relate to the internal affairs of Micronesia. (Appendix F, 13a-38a).

The decision of the Court of Appeals has maintained the delicate balance between individual rights and promotion of Micronesian self-government. In effect that decision has maintained the integrity and respect for the High Court of the Trust Territory which, given on-going status negotiations, will be again a "court of last resort" for Micronesians.

CONCLUSIONS

Based on the foregoing grounds, the judgment and opinion of the Court of Appeals for the Ninth Circuit should be allowed to stand, and a writ of certiorari should not issue.

Respectfully submitted,

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(Appendix Follows)

Appendix A

48 U.S.C. § 1681a.

Any appointment made on or after May 10, 1967 to the office of the High Commissioner of the Trust Territory of the Pacific Islands shall be made by the President by and with the advice and consent of the Senate.

Appendix B

1 T.T.C. § 101.

The following are declared to be in full force and to have the effect of law in the Trust Territory of the Pacific Islands:

(1) the Trusteeship Agreement;

(2) such laws of the United States, as shall, by their own force, be in effect in the Trust Territory, including the Executive Orders of the President and orders of the Secretary of the Interior;

(3) laws of the Trust Territory and amendments thereto;

(4) District Orders heretofore promulgated by the District Administrators of the Trust Territory and Emergency District Orders promulgated by the District Administrators in accordance with Section 108 of this Chapter;

(5) the acts of legislative bodies convened under charter from the High Commissioner when these acts are approved by the High Commissioner or otherwise become law as may be provided by charter or the laws and regulations of the Trust Territory; and.

(6) duly enacted Municipal Ordinances.

Appendix C

Environmental Quality Protection Act

(63 T.T.C. §§ 501-509)

§ 501. Short title. This Subchapter may be cited as the "Trust Territory Environmental Quality Protection Act."

§ 502. Public policy. The people of the Trust Territory of the Pacific Islands are dependent upon the air, land, and water resources of the islands for public and private water supply, for agricultural, industrial, recreational uses, and as a basis for tourism. Therefore, it is declared to be the public policy of the Trust Territory of the Pacific Islands, and the purpose of this Subchapter to achieve and maintain such levels of air, land and water quality as will protect human health, welfare and safety and to the greatest degree practicable prevent injury to plant and animal life and property, as will foster the comfort and convenience of its people and their enjoyment of health, life and property and will promote the economic and social development of the Trust Territory of the Pacific Islands and facilitate enjoyment of its attractions.

§ 503. Definitions. The following words, for the purposes of this Subchapter, shall have the following meanings:

(1) "Director of Health Services" shall mean the Director personally or his duly authorized representative.

(2) "Pollutant" means one or more substances or forms of energy which when present in the air, land or water, are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property.

(3) "Person" means the Trust Territory of the Pacific Islands, a district, municipality, political subdivision, a

public or private institution, corporation, partnership, joint venture, association, firm, or company organized or existing under the laws of the Trust Territory of the Pacific Islands or any state or country, lessee or other occupant of property, or individual, acting singly or as a group.

(4) "Board" means the Trust Territory Environmental Protection Board.

§ 504. Trust Territory Environmental Protection Board created: membership; terms; vacancies; chairman; qualifications; compensation; cooperation of other agencies; meeting of board; quorum; secretary.

(1) There is hereby established in the Office of the High Commissioner a board to be known as the Trust Territory Environmental Protection Board to be composed of nine members as follows: The Director of Health Services, Director of Public Works, Director of Resources and Development, and six citizens of the Trust Territory of the Pacific Islands, to be appointed by the High Commissioner with the advice and consent of the Congress of Micronesia: PROVIDED, that such appointments shall include one representative from each of the six administrative districts. The initial appointments of appointed members shall be made as follows: two for a period of one year; two for a period of two years; and two for a period of three years. Successors to the first appointees hereunder shall be appointed for terms of three years each. Vacancies other than by expiration of term shall be filled by the High Commissioner by appointment, in the same manner as the original appointment was made, for the unexpired term. The Chairman shall be the Director of Health Services.

(2) The High Commissioner in his appointments shall select persons who are citizens and residents of the Trust Territory of the Pacific Islands for their ability, and all

appointments shall be of such nature as to aid the work of the Board to inspire the highest degree of cooperation and confidence in carrying out the policy and purpose of this Subchapter.

(3) Members of the Board shall serve without compensation as such, but shall be entitled to receive travel costs and per diem at standard Trust Territory rates when engaged in the performance of the duties of the Board. Any employee of the Trust Territory Government shall be granted leave with pay while engaged in the performance of the duties of the Board.

(4) The Board may call upon any Trust Territory department or agency for technical assistance. All departments or agencies of the Trust Territory shall, upon request, assist the Board in the performance of its duties.

(5) The Board shall meet at least once every three months. Meetings may be held at any time or place to be determined by the Board upon the call of the chairman or upon written request of any three members. All meetings shall be open to the public, and public notice of the time and place of such meetings shall be posted in public places and shall be announced on the radio throughout the Trust Territory.

(6) Five members of the Board shall constitute a quorum for the transaction of business.

(7) The Board shall designate a secretary who shall keep all records of, and actions taken by, the Board. These records shall be open to the public for public inspection.

(8) The Attorney General shall, upon request of the Chairman, act as legal advisor to the Board.

(9) The Board shall designate a full-time salaried executive officer who shall administer the functions of the Board

and shall have such duties and responsibilities as may be delegated to him by the Board.

(10) The Board shall submit to the High Commissioner and to the Congress of Micronesia, not later than September 1 of each year, a Report detailing its activities during the previous fiscal year.

§ 505. Powers and duties of the Board. The Board shall have the power and duty to control and prohibit pollution of air, land, and water in accordance with the law and regulations adopted and promulgated by it, and for this purpose is authorized and empowered to:

(1) Adopt, approve, amend, revise, promulgate, and repeal regulations, in the manner which is or may be provided by law, to effect the purposes of this Subchapter, and enforce such regulations which shall have the force and effect of law.

(2) Accept appropriations, loans, and grants from the United States Government or any agency thereof and other sources, public or private, which loans, grants and appropriations shall not be expended for other than the purposes of this Subchapter.

(3) Adopt and provide for the continuing administration of a Trust Territory-wide program for the prevention, control, and abatement of pollution of the air, land and waters of the Trust Territory, and from time to time review and modify such program as necessary.

(4) Establish criteria for classifying air, land, and waters in accordance with present and future uses.

(5) Establish and provide for the continuing administration of a permit system whereby a permit shall be required for the discharge by any person of any pollutant in the air, land or water, or for the conduct by any person of any activity, including but not limited to the operation,

construction, expansion or alteration of any installation, which results in or may result in the discharge of any pollutant in the air, land or water; provide for the issuance, modification, suspension, revocation and termination of such permits, and for the posting of an appropriate bond.

(6) Collect information and establish record keeping, monitoring and reporting requirements as necessary and appropriate to carry out the purposes of this Subchapter.

§ 506. Right of entry. Whenever it is necessary for the purposes of this Subchapter, the Board, or any member, agent or employee when duly authorized by the Board or by court order may, at reasonable times, enter any establishment or upon any property, public or private, for the purpose of obtaining information, making inspections, obtaining samples, inspecting or copying records required to be maintained by the provisions of this Subchapter and any regulations promulgated thereunder, or conducting surveys or investigations for the purpose of carrying out the purpose and policy of this Subchapter.

§ 507. Enforcement and implementation.

(1) Whenever the Board finds that discharge of waste is taking place or threatening to take place within a district that violates or will violate requirements prescribed by the Board or that the waste collection treatment, or disposal facilities of a discharger are approaching capacity, the Board shall require the discharger to submit for approval of the Board, with such modifications as it may deem reasonably necessary, a detailed time schedule of specific actions the discharger shall take in order to correct or prevent a violation of requirements.

(2) When the Board finds that a discharge of waste is taking place or threatening to take place within its jurisdiction in violation of requirements of discharge prohibi-

tions prescribed by the Board, the Board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions a) comply forthwith, b) comply in accordance with a time schedule set by the Board, or c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community system, cease and desist orders may restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order.

(3) Public hearing for consideration of issuance of a cease and desist order shall be conducted by the Board, adequate notice of which and opportunity to appear and be heard at which shall be afforded to all interested persons.

(4) Cease and desist orders of the Board shall become effective and final as to the said Board upon issuance thereof. Copies shall be served forthwith by registered mail upon the person being charged with the violation of the requirements and upon other affected persons who appeared at the hearing and requested a copy.

(5) Any person who discharges any pollutant into the water, air, or on the land, of the Trust Territory in violation of any discharge permit, requirement or other order issued by the Board or who intentionally or negligently causes or permits any pollutant to be deposited where it is discharged into the water, air or land of the Trust Territory shall, upon order of the Board, clean up such pollutant or abate the effects thereof. Upon failure of any person to comply with such cleanup or abatement order, the Attorney General or his designated representative, at the request of the Board, shall petition the Trial Division of the High

Court for that district for the issuance of an injunction, mandamus or other appropriate remedy, requiring such person to comply therewith.

(6) The provisions of this Section and of 63 TTC § 508 shall be interpreted consistently with the provisions of any law concerning administrative procedure which is or may hereafter become Trust Territory law. In the event of conflict between the two, the provisions of the latter shall supersede and be controlling.

§ 508. Review by High Court. Any person who may be adversely affected by the enforcement of any standard policy, regulation, permit or order of the Board and who alleges its invalidity, may file a petition for a declaratory judgment thereon addressed to the Trial Division of the High Court in the district where the petitioner is a resident. The Court shall declare the standard, policy, regulation, permit or order invalid if it finds that it exceeds the statutory authority of the Board, or is arbitrary and capricious. An appeal may be had from the decision of the Court to the Appellate Division of the High Court as provided by law.

§509. Fines and penalties.

(1) Any person who intentionally or negligently violates any cease and desist order hereafter issued, reissued, or amended by the Board shall be liable civilly in a sum not to exceed one thousand dollars ($1,000) for each day during which such violation occurs. Such sums shall be paid to the Treasurer of the Trust Territory for credit to the General Fund of the Congress of Micronesia.

(2) The Attorney General or his designated representative, upon request of the Board, shall petition the Trial Division of the High Court for a judgment assessing damages. In determining such damages, the court shall take

into consideration all relevant circumstances, including but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs and corrective action, if any, taken by the discharger.

(3) Any person who intentionally or negligently violates any cease and desist order hereafter issued, reissued, or amended by the Board shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars ($1,000) or imprisonment not exceeding three (3) months, or both. For the purposes of this Subsection, each day during which such violation occurs shall be deemed to be a separate offense.

Appendix D

61 Stat. 397

JOINT RESOLUTION

Authorizing the President to approve the trusteeship agreement for the Territory of the Pacific Islands

Whereas the United States submitted to the Security Council of the United Nations for its approval in accordance with article 83 of the Charter of the United Nations a proposed trusteeship agreement for the Pacific islands formerly mandated to Japan under which the United States would be prepared to administer those islands under trusteeship in accordance with the Charter of the United Nations; and

Whereas the Security Council on April 2, 1947, approved unanimously the trusteeship agreement with amendments acceptable to the United States; and

Whereas the said agreement, having been approved by the Security Council, will come into force upon approval by the Government of the United States after due constitutional process: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is hereby authorized to approve, on behalf of the United States, the trusteeship agreement between the United States of America and the Security Council of the United Nations for the former Japanese mandated islands (to be known as the Territory of the Pacific Islands) which was approved by the Security Council at the seat of the United Nations, Lake Success, Nassau County, New York, on April 2, 1947.

Approved July 18, 1947.

Appendix E

6 T.T.C. § 357

Unless and until the Congress of the United States provides for an appeal to a court created by Act of Congress, the decisions of the Appellate Division of the High Court shall be final.

Appendix F

DRAFT COMPACT OF FREE ASSOCIATION*

12 July 1974

Compact Between the People of Micronesia and the United States of America*

Agreed draft between Ambassador F. Haydn Williams, the President's Personal Representative for Micronesian Status Negotiations and Senator Lazarus Salii, Chairman, Joint Committee on Future Status, Congress of Micronesia.

This draft compact is the result of negotiations between the United States Government and the Congress of Micronesia opened in September 1969. Since that first session, seven formal rounds of negotiations have been held. The draft compact resulting from these negotiations was revised to its present form during recent informal meetings in Carmel, California and Guam between the heads of the U.S. Delegation, Ambassador F. Haydn Williams and Mr. James M. Wilson, Jr., and the Micronesian Delegation, Senator Lazarus Salii and Representative Ekpap Silk.

Following the Guam meeting, Senator Salii presented the draft agreement to the members of the Joint Committee on Future Status for review before sending it on to the full membership of the Congress of Micronesia. Suggested changes made by the Joint Committee on Future Status are included in this draft with recommended deletions from the original in brackets and recommended additions double underlined.[1] These proposed changes have not as yet been discussed with or approved by the United States Government.

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*Proposed change by JCFS but not yet discussed with or approved by USG.

1. This refers to the typewritten draft. As printed for purposes of this Brief in Opposition, recommended additions are set out in black-letter type.

Preamble

The United States of America and the People of Micronesia,

Recognizing that among the responsibilities of the Government of the United States as Administering Authority of the Trust Territory of the Pacific Islands is the obligation to promote the development of the inhabitants of that territory toward self-government or independence, and

Recognizing their common interest in developing a new political status for the people of Micronesia to replace the present trusteeship,

Desiring to establish and embody a relationship between the people of Micronesia and the United States which is and shall remain close and enduring, for so long as the continuation of that relationship remains consistent with the best interests of the people of Micronesia and of the United States.*

AGREE to establish through this Compact [of Free Association] a system of self-government appropriate to the particular circumstance of Micronesia and its people and in accordance with the freely expressed wishes of the people concerned. This Compact, approved by the people of Micronesia through their sovereign right of self-determination and by the Government of the United States, shall determine the respective rights and responsibilities of the Government of Micronesia and the Government of the United States.

TITLE I
Internal Affairs

Section 101

The people of Micronesia have the right to adopt their own constitution and form of government and to amend or

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*Proposed by JCFS but not yet discussed or approved by USG.

change any such constitution or form of government at any time, provided that the constitution and laws of Micronesia shall [remain consistent]* **not be consistent*** with the provisions of this Compact, and shall guarantee to the inhabitants of Micronesia their fundamental human rights and shall establish a governmental structure consistent with the principles of democracy.

Section 102

The duly constituted Government of Micronesia shall have full responsibility for and authority over **all matters which relate to*** the internal affairs of Micronesia.

Section 103

The people of Micronesia, in the exercise of their right of self-determination, may in the event of termination of this Compact freely choose their own future political status in accordance with Title XI of this Compact.

TITLE II
Foreign Affairs

Section 201

(a) The Government of the United States shall have full responsibility for and authority over all matters which relate to the foreign affairs of Micronesia.

(b) The Government of the United States and the Government of Micronesia shall consult at the request of either of them on matters of mutual concern relating to foreign affairs.

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*Proposed by JCFS but not yet discussed or approved by USG.

(c) Without derogating from its powers under this Title the United States will respect the principle that the Government of Micronesia has full responsibility for and authority over the internal affairs of Micronesia.

Section 202

The authority of the United States under Section 201 includes the right to apply to Micronesia any appropriate treaty or other international agreement to which the United States is a party, provided, however, that the Government of the United States shall negotiate and conclude international treaties and agreements, or provisions thereof, which are intended to relate exclusively or predominantly to Micronesia **or which have a particularly pronounced effect on Micronesia*** only on the request and with the consent of the Government of Micronesia.

Section 203

In the exercise of its authority under Section 201, the Government of the United States undertakes the following responsibilities:

(a) The Government of the United States will extend consular assistance and diplomatic protection to citizens of Micronesia traveling outside of Micronesia and of the United States.

(b) The Government of the United States will give sympathetic consideration to applications by foreign countries for the establishment of Consulates in Micronesia, subject in each case to assurance from the Government of Micronesia that it would welcome the establishment of such a Consulate. The Government of the United States and the Government of Micronesia shall establish arrangements for

*Proposed by JCFS but not yet discussed or approved by USG.

the joint accreditation of foreign consular offices in Micronesia.

(c) The Government of the United States will facilitate Micronesian activity in the areas for which the Government of Micronesia may exercise responsibility under Annex A.

Section 204

In accordance with the terms of Annex A, the Government of Micronesia may undertake the activities specified therein.

TITLE III
Defense

Section 301

The Government of the United States shall have full responsibility for and authority over all matters which relate to defense in Micronesia.

Section 302

(a) The defense responsibility and authority of the United States Government provided for in Section 301 include:

(1) The defense of Micronesia, its people and territory, from attack or threats thereof;

(2) The right to prevent third parties from using the territory of Micronesia for military purposes; and

(3) The use of United States military bases which are established in Micronesia for the security of the United States, and to support its responsibilities for the maintenance of international peace and security.

(b) The Government of the United States may conduct the activities and operations within the lands, waters and airspace of Micronesia necessary for the exercise of its responsibility and authority under Section 302(a).

Section 303

(a) The Government of the United States shall have the exclusive right to establish, maintain and use military areas and facilities in Micronesia pursuant to paragraphs (b) and (c) of this section, the unencumbered right to protect all United States military facilities in Micronesia, and full freedom of use and access to all facilities and areas used for the conduct of military activities.

(b) The Government of Micronesia including its subdivisions shall assure the United States the rights and uses in the lands and waters specified in Annex B, which is an integral part of this Compact.

(c) If in the exercise of its authority and responsibilities under this Title the United States Government requires the use of areas within Micronesia in addition to those specified in Annex B, requests may be made of the Government of Micronesia to satisfy these requirements. The Government of Micronesia, including its subdivisions, shall establish suitable procedures to provide prompt response to any such request by the United States, and shall negotiate in good faith to achieve on reasonable terms an agreement for the use of such areas.

(d) The agreements for the lands and waters listed in Annex B shall conform with the provisions of this Compact and such agreements shall not contain any limitations on the use of such lands and waters which conflict with the basic authorities and responsibilities of the United States under Sections 301, 302, and 303 of this Title.

(e) The rights and uses specified in this Compact, and in agreements existing upon the entry into force of this Compact, shall at the option of the United States extend in full force and effect for the period of this Compact, unless a particular agreement provides for a longer term. Whenever agreements are extended, the terms of such agreements relating to payment shall continue, unless amended by mutual agreement.

Section 304

(a) No country other than the United States shall enjoy the right to conduct military activities or to establish and maintain military facilities and areas within the territory of Micronesia at any time, except as provided in paragraph (b) of this section.

(b) The United States Government may invite military units of other countries acting in conjunction with and under control of United States forces to utilize such military facilities and areas.

(c) The rights accorded the United States in paragraphs (a) and (b) above may not be assigned to any other country.

Section 305

The legal status of United States military personnel, of United States citizen civilian employees, and of their dependents, while present in Micronesia shall be established by mutual agreement. That jurisdictional agreement shall come into force simultaneously with this Compact.

Section 306

Citizens of Micronesia who are otherwise qualified in accordance with United States law shall be eligible to volunteer for service in the Armed Forces of the United

States, but shall not be subject to involuntary induction into military service unless they become permanent residents of the United States, as determined by United States law.

Section 307

The Government of the United States and the Government of Micronesia shall consult at any time requested by either of them on matters relating to defense. While not derogating from its full responsibility and authority in this area, the United States will to the extent possible without prejudice to the fullfillment of its defense responsibilities accommodate the expressed wishes of the Government of Micronesia.

TITLE IV

Financial Provisions

Section 401

The Government of the United States, in order to advance the economic and social welfare of the people of Micronesia and in recognition of the special relationship that has existed and continues to exist between the United States and Micronesia agrees to provide on a grant basis to the Government of Micronesia $35 million annually for the first five years of this Compact, $30 million annually for the next five years and $25 million annually for the next five years. These funds will be for use by the Government of Micronesia for programs and operations of that Government or any sub-division thereof as authorized by the Government of Micronesia.

Section 402

The Government of the United States shall make available to the Government of Micronesia $..... to cover compensation paid at fair market value for the use of land and water areas specified in Title III and Annex B.

Section 403

(a) The Government of the United States shall provide the Government of Micronesia, without compensation, the services of the U.S. Postal Service, U.S. Weather Service and U.S. Federal Aviation Administration. The level of such services in each district shall be that extended to that district on the date of the signature of this Compact. The Government of Micronesia shall make provision for the use of land necessary for such purposes at no cost to the United States Government.

(b) The Government of the United States and the Government of Micronesia from time to time may agree upon the extension of additional federal programs and services to Micronesia. Unless otherwise agreed, the cost of such additional programs and services will be charged against the overall assistance figure in Section 401.

(c) Neither the Government of Micronesia nor any subdivision thereof may impose taxes or other levies upon United States property or personnel, or the personal property of such personnel, present in Micronesia in connection with a service or program furnished by the United States under Section 403(a) of this Compact.

Section 404

(a) The Government of the United States will provide on a grant basis to a Government of Micronesia Capital Improvement Program Fund $12.5 million annually for the first five years of this Compact, $11 million annually for the next five years and $9.5 million annually for the next five years.

(b) The Government of the United States will also make available to the Government of Micronesia financial assistance on a loan basis for economic development projects in

an annual amount of $5 million for fifteen years subject to the terms of long-term low interest loan agreements between the Government of the United States and the Government of Micronesia. Of the $5 million annual loan, $2.5 million will be reserved for allocation to District Governments for small business loans at the district level; the remainder of the funds will be retained at the central government level for increasing the capital of the Micronesian Development Bank or other financial institutions involved in loan or equity financing of economic development projects of larger scale than those encompassed by the small business loan funds.

Section 405

The Government of Micronesia and the Government of the United States shall negotiate in good faith as to the amounts of economic assistance, as provided for in this Title, for periods subsequent to the first fifteen years after the effective date of this Compact. Pending agreement on new amounts of such assistance the United States will continue assistance to the Government of Micronesia under Sections 401, 403 and 404 subject to the gradually descending five year scales established in Sections 401 and 404(a) as adjusted pursuant to Section 406 of this Compact.

Section 406

(a) If in any year the funds to be provided for that year under Section 401 and 404 are not completely used, the unused balance shall remain available to the Government of Micronesia in addition to the funds to be provided in subsequent years.

(b) The funds provided under Sections 401 and 404(a) may be reallocated at any time by agreement between the

Government of the United States and the Government of Micronesia.

(c) The dollar amounts stipulated in Sections 401 and 404 for each year will be adjusted at the beginning of each fiscal year to reflect, as necessary, the change in purchasing power of U.S. currency as reflected by changes in the Guam Consumer Price Index, using U.S. fiscal year 1975 as the basing point for such adjustment.

(d) Sections 401, 403(a) and 404 will be reviewed by the Government of Micronesia and the Government of the United States at five year intervals from the effective date of this Compact **or more frequently upon the agreement of the two governments*** and adjusted as appropriate taking into account changes in economic conditions other than changes in the purchasing power of U.S. currency.

(e) The Government of Micronesia and the United States General Accounting Office shall determine procedures for the periodic general audit of all grants, loans, and funds expended for federal services and programs as stipulated in this Title.

TITLE V

Applicable Laws

Section 501

(a) The treaties and international agreements applicable to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact shall be applicable to Micronesia, as well as the treaties and international agreements made applicable to Micronesia pursuant to Section 202 of this Compact.

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*Proposed by JCFS but not yet approved or discussed with USG.

(b) The statutory law of the United States applicable to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact shall not be applicable to Micronesia except as otherwise provided in this Compact or in other agreements between the United States and Micronesia.

Section 502

(a) Treaties and international agreements applicable to Micronesia shall have the force of internal law in Micronesia without the need of implementing legislation if they are self-executing, regardless of whether such treaties or international agreements became or shall become applicable to Micronesia prior to or after the effective date of this Compact. A treaty or international agreement shall be presumed to be self-executing if the United States has not enacted implementing legislation for itself of its proclamation by the President of the United States.

(b) The Government of Micronesia will enact whatever domestic legislation is appropriate or required to enforce or implement those treaties and international agreements applicable to Micronesia pursuant to Section 501(a) of this Compact which are not self-executing. The implementing legislation enacted by the United States shall, however, have the force of internal law in Micronesia pending the enactment of the Micronesian legislation provided for in this subsection.

(c) The Government of Micronesia and its subdivisions will undertake to comply with and to enforce faithfully the treaties, international agreements and laws set forth in subsections (a) and (b) of this section.

Section 503

(a) The Government of Micronesia and its subdivisions will adopt and enforce such measures as may be necessary (1) to protect the personnel, property, installations, services, programs and official information maintained by the Government of the United States in Micronesia pursuant to this Compact, and (2) to ensure the effective implementation of the services and programs provided by the Government of the United States in Micronesia pursuant to this Compact. Such measures shall include appropriate and adequate civil and criminal remedies against:

1. Fraud against the Government of the United States.
2. Theft, embezzlement or destruction of property belonging to or in the custody of the Government of the United States; or the theft or unauthorized use of official information of the Government of the United States.
3. Interference with the operation of installations, programs or services maintained by the Government of the United States in Micronesia pursuant to this Compact.

(b) In the event the Government of Micronesia or its subdivisions do not adopt and enforce the measures required by sub-section (a) of this section, the related programs or services extended by the United States to Micronesia under Section 403 may then be withheld to the extent that the implementation or operation of such programs or services is thereby seriously and unreasonably impeded.

(c) The Government of the United States may, with the approval of the Government of Micronesia, provide investigative and enforcement services to insure compliance

with the laws and regulations relating to services and programs extended to Micronesia by the United States pursuant to this Compact.

Section 504

(a) Nothing in this Compact shall be construed as constituting a submission of either the Government of Micronesia or the Government of the United States to the jurisdiction of the courts of the other.

(b) The Court of Claims of either of the governments shall not have jurisdiction over any claim against either of the governments growing out of or dependent upon this Compact.

(c) The provisions of Section 1346(b) and of Chapter 171, Title 28, United States Code shall not be applicable to any claim arising in Micronesia.

Section 505

The Government of Micronesia and the Government of the United States will cooperate with each other in the pursuit, capture, imprisonment and delivery to appropriate authorities of fugitives from justice who have fled from the jurisdiction of one Government to that of the other. The precise terms of this mutual obligation shall be the subject of a later separate agreement between the Government of Micronesia and the Government of the United States.

Section 506

In the conduct of its activities in Micronesia the Government of the United States will endeavor to protect the surrounding environment from permanent or irreparable damage by adhering to standards no less restrictive than those established by United States law, except as otherwise may be agreed.

TITLE VI

Trade and Commerce

Section 601

The Government of Micronesia will have the authority to establish, change or eliminate import **and export*** duties and other regulations, including internal charges, laws and conditions governing the importation **and exportation*** of and commerce in goods from outside of Micronesia, except as otherwise provided in this Compact or as otherwise agreed.

Section 602

The United States and Micronesia will each accord to products of the other treatment no less favorable than that accorded like products of any foreign country with respect to customs duties and charges of a similar nature and with respect to laws and regulations relating to importation, exportation, taxation, sale, distribution, storage and use, except as otherwise agreed.

Section 603

(a) The Government of Micronesia shall have the power to regulate domestic air and maritime commerce between points each of which is within Micronesia to the extent that such regulation does not conflict with the treaties and international agreements applicable to Micronesia pursuant to Section 501(a) and the authority of the United States pursuant to Title II of this Compact and does not conflict with appropriate regulations of the Federal Aviation Agency.

(b) The Government of the United States shall obtain the consent of Micronesia before granting any new author-

*Proposed by JCFS but not yet discussed or approved by USG.

ity to any United States or foreign air carrier for international air commerce to or from Micronesia, except for aircraft operated for or under the control of the Government of the United States in connection with activities under Title III.

Section 604

The currency of the United States will continue to be the official legal tender for Micronesia until such time as the Government of Micronesia acts to institute its own currency. The terms and conditions of an appropriate currency transitional period shall be as mutually agreed.

TITLE VII
Citizenship and Nationality

Section 701

Every person who is a citizen of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact, or who thereafter becomes a citizen of Micronesia [by birth,]* and who has not taken any affirmative step to preserve or acquire any foreign citizenship or nationality, shall be **accorded treatment as*** a national but not a citizen of the United States **for purposes of immigration and travel except as provided in Section 801(b)*** unless he is otherwise qualified for U.S. citizenship.

Section 702

Any person described in Section 701 who is a citizen or a national of a [foreign] country other than Micronesia **or the United States*** shall cease to be **accorded treatment as***

*Proposed by JCFS but not yet discussed or approved by USG.

a national of the United States within one year after the effective date of this Compact, or within six months after becoming 18 years of age, whichever comes later, unless he renounces that foreign citizenship or nationality.

TITLE VIII*
Immigration and Travel

Section 801

(a) The Government of Micronesia shall have the power to regulate immigration and entry of persons who are not citizens of Micronesia, except as provided in this Compact or as otherwise agreed.

(b) Citizens and nationals of the United States who are not citizens of Micronesia shall be free to enter and exit Micronesia but not to establish residence in Micronesia except with the consent of the Government of Micronesia. Citizens of Micronesia who are **accorded treatment as*** nationals of the United States shall be free to enter and exit the United States, **its territories and possessions,*** but not to establish residence in the territories or possessions of the United States except with the consent of the Government of the United States. Citizens of Micronesia who are not United States citizens [or nationals]* shall be accorded treatment as aliens for [these purposes]* the purpose of residence in United States territories and possessions.

(c) Micronesian provisions applicable to entry and exit to and from Micronesia by citizens and nationals of the United States and personnel sent to Micronesia pursuant to Section 403 of this Compact shall not be more restrictive than the comparable United States regulations governing those Micronesian citizens who are United States nationals.

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*Proposed by JCFS but not yet discussed or approved by USG.

TITLE IX

Representation and Consultation

Section 901

The Governments of the United States and of Micronesia agree to establish at the central seat of Government of Micronesia and in Washington, D.C., respectively, Resident Offices for the purposes of maintaining close and regular consultations on matters of mutual interest. The privileges and immunities respecting the Resident Offices shall be as set forth in Annex C.

TITLE X

Dispute Settlement

Section 1001

In the event of a dispute which relates to the interpretation or application of the provisions of this Compact, the Government of Micronesia and the Government of the United States shall negotiate in good faith in an effort to settle the dispute.

TITLE XI

Amendment and Change of Status

Section 1101

This Compact may be amended at any time by mutual consent of the Government of Micronesia and the Government of the United States.

Section 1102

(a) This Compact may be terminated at any time by mutual consent of the Government of Micronesia and the Government of the United States.

(b) After the expiration of the first fifteen years following its entry into force this Compact may also be terminated

unilaterally: (1) by the Government of the United States in accordance with its constitutional processes, such termination to be effective on a date not earlier than two years following receipt by the Government of Micronesia of notice of the Government of the United States' intention to terminate; or (2) by the Government of Micronesia by referring the issue to the people of Micronesia eligible to vote in any local or general election as defined in the Constitution of Micronesia. If two-thirds or more of such voters shall favor termination, including a two-thirds majority in each of at least two-thirds of the districts of Micronesia, the Government of Micronesia shall upon certification of the results of the vote on this issue give notice thereof to the Government of the United States and may take action to terminate the Compact effective on a date not earlier than two years following such notice, subject to the provisions of Section 1103. The action of the Government of Micronesia and the termination of the Compact shall not be applicable to any district of Micronesia in which a two-thirds majority of the voters have voted against termination.

(c) During the period of two years prior to the effective date of termination set forth under the provisions of Section 1102(b), any district in which a two-thirds majority of the voters has voted against termination shall be given the opportunity to negotiate with the United States with respect to that district's future political status. Upon the effective date of termination, if an agreement has not been concluded with respect to the future political status of any such district, all relevant provisions of this Compact shall continue in full force and effect with respect to that district subject to agreement of the United States and that district upon an appropriate adjustment in the level of financial aid to be provided to that district by the United States under Title IV.

Section 1103

(a) In the event either government gives notice of its intention to terminate this Compact pursuant to 1102(b) and before any termination may become effective, the United States' rights and uses in the lands and waters covered by then existing leases and the rights of denial set forth in Section 302 of this Compact shall be embodied in a mutual security agreement between the Government of Micronesia and the Government of the United States which shall enter into force simultaneously with the termination of this Compact.

(b) The parties shall negotiate in good faith to complete such mutual security agreement within two years of notice of intent to terminate this Compact under Section 1102(b) and the amounts of assistance provided under Sections 401, 403 and 404(a) and (b) shall not be further reduced in that two year period during which the provisions of Section 405 shall not apply.

TITLE XII

Approval of the Compact and Effective Date

Section 1201

(a) This Compact will be approved by Micronesia if a majority of at least 55% of those voting in a plebiscite to be held in Micronesia vote in favor of the Compact. All persons who would be eligible to vote in elections for the Congress of Micronesia, if such elections were held on the day the plebiscite is conducted, shall be eligible to vote in the plebiscite. In determining whether the required majority has voted for or against the Compact, only the affirmative and the negative votes shall be counted. The Compact shall not become effective, however, in any district in which ⅔ of those voting have voted against the Compact. Such dis-

trict shall be given an immediate opportunity to negotiate with the United States with respect to that district's future political status. The provisions of the Compact shall also be adjusted appropriately by agreement to be applicable only to the remaining districts of Micronesia.

(b) This Compact will be approved by the United States in accordance with its constitutional processes.

Section 1202

The President of the United States shall issue a proclamation announcing a date mutually acceptable to the Government of the United States and Micronesia at which the Compact will come into effect, when he finds:

1. That the Compact has been approved as provided for in Section 1201; and that

2. The people of Micronesia have adopted a Constitution pursuant to Section 101 of the Compact; and that

3. The Trusteeship Agreement between the United States and the Security Council of the United Nations for the former Japanese Mandated Islands has been terminated or will terminate on the day on which the Compact becomes effective.

ANNEX A

I. The Government of Micronesia may undertake the following activities pursuant to Section 204 of the Compact.

(a) The Government of Micronesia may seek associate or other appropriate membership for which Micronesia may be eligible in regional organizations, United Nations Specialized Agencies, or their subsidiary bodies, of which the United States is a member. The Government of the United States will sponsor such applications and will give sympathetic consideration to requests from the Government of Micronesia to apply for appropriate membership in any

other such organizations in which the United States is not a member. The Government of the United States will assist Micronesia in training personnel to participate in these organizations.

(b) The Government of Micronesia may negotiate and conclude in the name of Micronesia agreements of a cultural, educational, financial, scientific or technical nature that apply only to Micronesia with any international organization in which Micronesia is a member.

(c) The Government of Micronesia may establish temporary or permanent representation of Micronesian trade or other commercial interests in foreign countries, or accept foreign trade or commercial representation in Micronesia.

(d) The Government of Micronesia may request the Government of the United States to negotiate with foreign countries agreements of a commercial, cultural, educational, financial, scientific or technical nature which shall apply to Micronesia. The Government of the United States shall give sympathetic consideration to such requests.

II. In advance of undertaking any initiative pursuant to its discretion under Paragraph I of this Annex, the Government of Micronesia shall inform the Government of the United States of its proposed action and shall keep the Government of the United States fully informed of the progress and conduct of such activities.

III. The Government of the United States will promptly notify the Government of Micronesia if it appears that any proposal or activity of the Government of Micronesia pursuant to this Annex conflicts with the international commitments, responsibilities or policies of the Government of the United States or if it is likely to lead to such conflict. In accordance with Section 201(b) of this Compact the Gov-

ernment of the United States will consult as requested with the Government of Micronesia and will seek to consult before issuing a notification pursuant to this paragraph.

IV. Upon notification by the Government of the United States that an activity proposed or engaged in by the Government of Micronesia pursuant to this Annex conflicts or is likely to conflict with the international commitments, responsibilities or policies of the United States, the Government of Micronesia will refrain from or promptly terminate such activity.

ANNEX B

(a) Pursuant to Sections 302 and 303 of the Compact, the parties agree that the rights and uses of the United States in the lands and waters of Micronesia include:

(1) *Marshall Islands*

a) Within the Kwajalein Atoll, continuing rights for the use of those lands and waters associated with and currently controlled as part of the Kwajalein Missile Range, the land portion of which encompasses approximately 1,320 acres.

b) In the Bikini Atoll, continuing rights for use of 1.91 acres of Ourukaen and Eniman islets, and to use the pier, airfield and boat landing on Eneu Islands.

c) In the Eniwetok Atoll, retention of such use rights as may be negotiated upon return of the atoll.

(2) *Palau Islands*

a) Access and anchorage rights in Malakal harbor and adjacent waters, together with rights to acquire 40 acres for use within the Malakal harbor area, composed of submerged land to be filled and adjacent fast land.

b) Rights for the joint use of an airfield capable of supporting military jet aircraft (the proposed airfield at Garreru Island reef, or Babelthuap airfield/Airai site), the right to improve that airfield to meet military requirements and specifications and the right to develop an exclusive use area for aircraft parking, maintenance and operational support facilities.

c) On the island of Babelthuap the right to acquire 2,000 acres for exclusive use, along with the right for non-exclusive use of an adjacent area encompassing 30,000 acres, for intermittent ground force training and maneuvers.

[(3) Continuing rights to occasional or emergency use of all harbors, waters and airfields throughout Micronesia.]*

(3) Mariana Islands. (Inserted in this Subparagraph will be those lands and waters which have been agreed upon for use by the United States by the people of the Mariana Islands.)*

(4) Continuing rights to use of existing Coast Guard facilities.

(b) Agreements for lands and waters specified in paragraph (a) above are listed below. All agreements for the use of lands and waters concluded after the effective date of this Compact, and all modifications to any agreement under this Title, shall conform to the provisions of this Compact and shall be listed in this Annex.

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*Proposed by JCFS but not yet discussed with or approved by USG.

ANNEX C

(a) The Governments of Micronesia and of the United States, and the heads of their respective Resident Offices, shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of their respective Resident Offices, whether owned or leased, other than such as represent payment for specific services rendered.

(b) Any person employed by the Government of Micronesia in its Resident Office who is neither a citizen nor a permanent resident of the United States, or any person employed by the Government of the United States in its Resident Office who is neither a citizen nor a permanent resident of Micronesia, shall be exempt from income and social security taxes levied under the laws of the host Government or any of its subdivisions with respect to income which is paid from funds provided by the employing Government or any agency thereof and upon which they are subject to the income or social security tax laws of the employing Government or any other Government and from taxes on the purchase, ownership, use or disposition or personal movable property (including automobiles) intended for their own use. Such employees and members of their families shall receive the same treatment with respect to the payment of customs and import and export duties on personal effects, equipment and supplies imported into the territory of the other Government for their own use, and with respect to other duties and fees, as is accorded by the Government of the United States to diplomatic personnel of foreign countries resident in the United States, subject only to the limitation that continuous customs free entry shall be limited to personnel, including their families, of comparable grade to the diplomatic personnel accorded continuous customs free entry by the United States.

(c) The premises of the Resident Offices including the residences of the Heads of the Resident Office shall be inviolable. Neither the agents of the Government of Micronesia nor those of the Government of the United States may enter the premises of the other Government's Resident Office except with the consent of the head of that Resident Office or someone authorized to act on his behalf.

(d) The premises of each Government's Resident Office, their furnishings and other property thereon and the means of transport of the Resident Office shall be immune from search, requisition, attachment or execution, except insofar as such immunity is expressly waived by the head of the Resident Office or someone authorized to act on his behalf.

(e) Any person employed by either the Government of Micronesia or the Government of the United States in its Resident Office who is also a citizen of the employing Government shall enjoy immunity from the criminal jurisdiction of the other Government or its subdivisions. This immunity shall extend to all members of the family of such a person forming a part of his household, if they are not citizens of the receiving Government.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-622

THE PEOPLE OF SAIPAN, BY AND THROUGH HERMAN Q. GUERRERO, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., AND CONTINENTAL AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28a-48a) is reported at 502 F.2d 90. The opinion of the district court (Pet. App. 1a-27a) is reported at 356 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1974. A timely petition for rehearing was denied on September 3, 1974. The petition for a writ of certiorari was filed on November 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a suit challenging, under the National Environmental Policy Act, 83 Stat. 852-854, 42 U.S.C. 4321-4335,

the legality of the execution of a lease on Saipan by the High Commissioner of the Trust Territory was properly dismissed by the district court.

STATEMENT

Saipan is part of the Trust Territory of the Pacific Islands (Micronesia), administered by the United States for the United Nations pursuant to a trusteeship agreement, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

In 1970, Continental Airlines applied to the Trust Territory government for permission to build a hotel on public land, and a lease was executed in 1972 (Pet. App. 29a). In late 1972, after construction of the hotel had begun,[1] several of the petitioners in the present action brought suit in the High Court of the Trust Territory to enjoin construction of the hotel. The High Court, while denying defendants' motions to dismiss on certain non-federal causes of action, held that the National Environmental Policy Act, 83 Stat. 852-854, 42 U.S.C. 4321-4335, did not apply to actions of the Trust Territory government, as plaintiffs had contended, since the Trust Territory government was not a "federal agency" within the meaning of the Act, 42 U.S.C. 4332 (Pet. App. 30a, n. 1).

Petitioners thereupon commenced this action in the United States District Court for the District of Hawaii, charging that execution of the lease violated the National Environmental Policy Act, and the fiduciary duties of the Department of the Interior.

The district court denied petitioners' motion for a temporary restraining order and granted respondents' motion

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[1]Construction of the hotel has been largely completed during the two-year pendency of this suit. Continental was, however, notified of the pendency of the suit soon after it commenced bulldozing the area in preparation for construction (Pet. App. 42a-43a).

to dismiss on the grounds that the Administrative Procedure Act, 5 U.S.C. 701(b)(1)(C), excluded from judicial review all governments created pursuant to the authority of Congress, such as the Trust Territory, that the government of the Trust Territory was not a federal agency subject to judicial review under either the Administrative Procedure Act or the National Environmental Policy Act, and that the trusteeship agreement did not vest plaintiffs with individual legal rights they could assert in the federal district court (Pet. App. 3a, 19a).

The court of appeals affirmed. While agreeing that neither the APA nor NEPA applied, the court held that the High Commissioner's action should be reviewed in light of the Trusteeship Agreement and local law, but that such review must be undertaken, at least initially, by the High Court of the Trust Territory (Pet. App. 39a-40a).

ARGUMENT

1. The decision by the Trust Territory government to grant the lease at issue was not a decision of an "* * * agenc[y] of the Federal Government* * *" to which the National Environmental Policy Act applies.

Although the Act does not contain a definition of "federal agency", the origin and functioning of the Trust Territory government, as well as analogous statutory schemes such as the Administrative Procedure Act and the Federal Tort Claims Act, 28 U.S.C. 2671-2680, indicate that internal decisions of the Trust Territory government, such as the one in the instant case, cannot be imputed to the United States government.

a. The Trust Territory government is not an agency of the federal government. It derives its authority ultimately from the United Nations, not the United States. The United States is merely the Administering Authority for the is-

land area, pursuant to its Trusteeship Agreement with the United Nations, 61 Stat. 3301. In entering into the Agreement, the United States made it clear that it did not consider its role of trustee to encompass sovereignty over the islands. 16 Department of State Bulletin 416, 417 (1947). This disavowal of sovereignty is in accordance with the accepted view of trust territories under international law: "[w]herever sovereignty does rest [with respect to the trust territories] it is not with the administering power." Sayre, *Legal Problems Arising from the United Nations Trusteeship System,* 42 Am. J. Int'l Law 263, 271 (1948).

In undertaking administration of the Trusteeship, Congress directed that "all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall * * * be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize." 48 U.S.C. 1681. Effective July 1, 1962, the President redelegated his authority for civil administration of the Territory to the Secretary of the Interior. Executive Order No. 11021, 27 Fed. Reg. 4409. Pursuant to these orders, the Secretary established in 1968 a Trust Territory Government which includes legislative, judicial, and executive branches, with the High Commissioner as chief executive of the Territory. Secretarial Order No. 2918, 34 Fed. Reg. 157. While the High Commissioner is appointed by the President with the advice and consent of the Senate, 48 U.S.C. 1681a, the Territory operates under its own legal code and inhabitants of the islands are citizens of the Territory, not of the United

States. See *Porter* v. *United States,* 496 F.2d 583, 588 (Ct. Cl.).[2]

Indeed, the Trust Territory has its own Environmental Quality Protection Act, enacted by the Congress of the Trust Territory. 63 T.T.C. (Supp. No. 1) 501-509.[3] The Act establishes an Environmental Protection Board, which is authorized to "control and prohibit pollution of air, land, and water in accordance with the law and regulations adopted and promulgated by it" (63 T.T.C. 505) and to enforce its orders by seeking injunctive relief, damages, or criminal penalties (63 T.T.C. 507-509).

b. Moreover, the federal government did not participate in the decision to grant the lease at issue in the instant case. Continental Airlines applied in 1970 to the Trust Territory government for permission to lease public land on which to build a hotel. Pursuant to the Trust Territory Code, 67 T.T.C. 53, the application was submitted to the Mariana Islands District Land Advisory Board for its consideration. Although the Board recommended against the plan, the District Administrator of the Marianas District recommended that the lease be approved (Pet. App.

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[2]A proposed Compact of Free Association, yet to be approved by Congress and by Trust Territory plebiscite, would grant the Government of Micronesia "full responsibility for and authority over all matters which relate to the internal affairs of Micronesia" (Section 102) while giving the United States responsibility over foreign affairs and defense (Sections 201 and 301). The proposed Compact would make the statutory law of the United States applicable to the islands only as provided in agreements between the United States and Micronesia (Section 501(b)). See Draft Compact of Free Association (July 12, 1974) (Br. of Resp. High Commissioner App. 13a-38a). At the time of the filing of this action, however, Secretarial Order No. 2918, *supra*, was still in full effect (Pet. App. 18a, n. 23).

[3]The law of the Trust Territory is codified in the Trust Territory Code (T.T.C.).

29a). The High Commissioner thereupon executed the lease on behalf of the Trust Territory government.

As the district court determined on the basis of affidavits submitted by the parties and testimony at the hearing on petitioners' Motion for a Temporary Restraining Order and at the hearing on respondents' Motion to Dismiss (Pet. App. 22a, n. 28):[4]

> [t]he lease approval was a "local" decision of the High Commissioner acting within the scope of his duties as chief executive of the Trust Territory Government. The officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form.

c. As a further indication that internal decisions of the Trust Territory government cannot be deemed to be decisions of an "agenc[y] of the Federal Government" under the National Environmental Policy Act, analogous statutes, whose provisions apply to all federal agencies, have been deemed inapplicable to actions of the Trust Territory government.

The Administrative Procedure Act, for example, which provides for judicial review of "agency action", 5 U.S.C. 702, and defines an agency as "each authority of the Government of the United States", 5 U.S.C. 701(b)(1), expressly excludes from its coverage "the governments of the territories or possessions of the United States."

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[4]Petitioners contend that the district court improperly permitted introduction of evidence on a motion to dismiss without treating the motion as one for summary judgment under Rule 56(c), Fed. R. Civ. P. The error, if any, was harmless, since the court of appeals' conclusion that the National Environmental Policy Act is inapplicable to the decision to grant the lease did not turn on any disputed finding of fact.

5 U.S.C. 701(b)(1)(C). And, as indicated by the courts below, the legislative history of the Act plainly shows that Congress intended by this provision to exclude from judicial review all governments created pursuant to the authority of Congress (H. Rep. No. 1980, 79th Cong., 2d Sess., p. 16; 92 Cong. Rec. 2150), presumably including the government of the Trust Territory (Pet. App. 19a-20a, 32a).

Moreover, the Trust Territory has been deemed a "foreign country" under the Federal Tort Claims Act, 28 U.S.C. 2680(k) (*Callas* v. *United States*, 253 F.2d 838 (C.A. 2); see also *Brunell* v. *United States*, 77 F. Supp. 68 (S.D.N.Y.)), and a "foreign state" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(14) (*Application of Reyes*, 140 F. Supp. 130 (D. Ha.) *Aradanas* v. *Hogan*, 155 F. Supp. 546 (D. Ha.)).

In *Porter* v. *United States*, 496 F.2d 583 (Ct. Cl.), the court determined that the Trust Territory was not an "agency of the United States" for the purpose of asserting jurisdiction against the United States for an alleged breach of a contract negotiated by officials of the Trust Territory Government. As the court stated (*id.* at 588):

> While the United States has retained direct control in certain fields, such as foreign affairs, the daily administration of the islands has largely shifted into the hands of the local government. The Territory operates under its own comprehensive legal code.* * *
>
> * * * * * *
>
> * * * [T]he [Trust] Territory government is not an agency of the United States for contract purposes.

See also *Harris* v. *Boreham*, 233 F.2d 110 (C.A. 3).

d. Petitioners contend that the High Commissioner was bound by the Trusteeship Agreement to act pursuant to the National Environmental Policy Act. The Trusteeship Agreement does not, however, require compliance with the Act. Rather, it provides that the United States "* * * may apply to the trust territory * * * such of the laws of the United States as it may deem appropriate to local conditions and requirements" (Art. 3, Pet. App. 56a). This provision requires specific federal legislation before any law of the United States becomes the law of the Trust Territory. No legislation specifically applies the National Environmental Policy Act to the Trust Territory.

Moreover, the Trust Territory Code provides that the Trust Territory shall give effect only to "such laws of the United States, as shall, *by their own force,* be in effect in the Trust Territory* * *." 1 T.T.C. 101 (emphasis supplied). Although Congress has specifically listed the Trust Territory within the coverage of a number of statutes, it did not list the Trust Territory within the coverage of the National Environmental Policy Act. See *People of Enewetak* v. *Laird,* 353 F. Supp. 811 (D. Ha.).

2. Petitioners also contend that the court of appeals erroneously committed to the High Court of the Trust Territory the question whether the action of the High Commissioner complied with the Trusteeship Agreement to "protect the inhabitants against the loss of their land and resources* * *" (Trusteeship Agreement, Art. 6). They argue that members of the High Court, appointed by the Department of Interior, should not be the final arbiters of the legality of Departmental action under federal law (Pet. 11).

However, neither federal law nor any actions of the Department of the Interior will be at issue before the High Court. In concluding that action of the High Commissioner

could be reviewed in light of the Trusteeship Agreement, the court of appeals did not suggest that the Agreement vested the citizens of the Trust Territory with rights against the United States which they could assert in federal court. Rather, the court concluded that the "[a]greement can be a source of rights enforceable by an individual litigant in a domestic court of law" (Pet. App. 36a) against his own government, upon which the Trusteeship Agreement is binding. "Surely, the judicial branch of the Trust Territory government has the authority to determine whether or not the action of its chief executive complies with a provision in its own constitutional document" (Pet. App. 38a). Thus the law to be applied by the High Court is in effect the constitutional law of the Trust Territory (see Parry, *The Legal Nature of Trusteeship Agreements,* 27 Brit. Year Book Int'l Law 164, 182-184 (1950)), and the actions to be scrutinized are those of the High Commissioner.

The High Court of the Trust Territory—the Territory's judicial authority, made expressly independent of the executive and legislative powers, Department of Interior Order 2918, *supra,* Part IV—is the appropriate forum for determining whether the High Commissioner violated the Trusteeship Agreement in granting the lease to Continental Airlines. Since the High Commissioner acted pursuant to local statutes in granting the lease, the High Court presumably will have an opportunity to test the validity of those statutes, on their face or as applied, under the Trusteeship Agreement.

Under the doctrine of abstention, it is appropriate that the construction of local laws be left to local courts. See *Chicago* v. *Fieldcrest Dairies,* 316 U.S. 168, 171-172. Abstention is particularly appropriate with respect to the rapidly evolving law of the Trust Territory. Article 6 of the Trusteeship Agreement requires the administering authority

to "foster the development of such political institutions as are suited to the trust territory and * * * promote the development of the inhabitants of the trust territory toward self-government* * *." Moreover, as has already been indicated, the proposed Compact of Free Association, soon to be voted upon by the people of the Trust Territory, would grant them full responsibility for and authority over their own internal affairs. See note 2, *supra*. Intrusion by the federal courts at this stage in the development of the Trust Territory's legal and political institutions would, we submit, be both unwise and unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1975.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-622

THE PEOPLE OF SAIPAN, BY AND THROUGH HERMAN Q. GUERRERO, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., AND CONTINENTAL AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner raised broad issues regarding whether the National Environmental Policy Act (NEPA) applied to the Trust Territory of the Pacific Islands (Pet. 2, 6-8), and in our Brief in Opposition we pointed out that the Trust Territory's legal and political structure, which affected whether NEPA applied there, were in a state of change because of the proposed Compact of Free Association between the United States and the Government of Micronesia, which would, if approved by Congress and island plebiscite, grant the people of the Trust Territory full responsibility for and authority over their own affairs (Brief in Opp. 5 n.2, 9-11).

However, in order to avoid any possible misunderstanding in regard to this matter, we file this Supplemental Brief to point out that Saipan is not within the area covered by the Compact, but instead comes within the jurisdiction of a separately proposed Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, signed February 15, 1975.[1]

If approved by fifty-five percent of the people of the Northern Mariana Islands, and the United States Congress (Article X, Section 1001 (a) and (b)), the Covenant would establish "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States of America" (Article I, Section 101). The Covenant would grant the people of the Northern Mariana Islands, including Saipan, the "right of local self-government" with respect to "internal affairs in accordance with a Constitution of their own adoption" (Article I, Section 105). Executive power would be vested in a popularly elected Governor and other such officials as the Constitution or laws of the Northern Mariana Islands may provide (Article II, Section 203(b)), legislative power in a popularly elected legislature (Article II, Section 203(c)), and judicial power in such courts as the Constitution or laws of the Northern Mariana Islands may provide (Article II, Section 203(d)).[2]

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[1]We have lodged a copy of the Covenant with the Clerk of this Court.

[2]Pursuant to the Covenant, the United States is required to establish a "District Court" for the Northern Mariana Islands as part of the same judicial circuit as Guam (Article IV, Section 401, which would have such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide (Article IV), Section 402(c)).

The Covenant would confer United States citizenship on citizens of the Trust Territory within the Northern Mariana Islands who wish to become United States citizens (Article III, Sections 301 and 302). Certain laws of the United States in existence on the effective date of the Covenant, and their subsequent amendments, will apply to the Northern Mariana Islands, including laws applicable to Guam and "which are of general application to the several States as they are applicable to the several States", (Article V, Section 502(a)(2)).

The Covenant will become fully effective, at the earliest, in 1981. At the present time, and at the time of the filing of this action, Secretarial Order No. 2918, 34 Fed. Reg. 157, was in full effect, pursuant to the Trust Territory Agreement between the United States and the Security Council of the United Nations, 61 Stat. 3301 (Br. in Opp. 4).

As we stated in our Brief in Opposition, intrusion by the federal courts at this stage in the development of the Trust Territory's legal and political institutions would be inappropriate.

Respectfully submitted.

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FEBRUARY 1975.